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# DECRIMINALIZING VIOLENCE: A CRITIQUE OF RESTORATIVE JUSTICE AND PROPOSAL FOR DIVERSIONARY MEDIATION

M. Eve Hanan\*

## INTRODUCTION

The movement to reduce over-prosecution and mass incarceration has focused almost exclusively on non-violent offenders despite data showing that over half of all prisoners incarcerated within the United States are sentenced for crimes of violence.<sup>1</sup> As a consequence of the focus on nonviolent offenses, the majority of current and future defendants will not benefit from initiatives offering alternatives to criminal prosecution and incarceration.

A discussion of alternatives to the criminal justice system in cases of violent crime must begin by acknowledging that violent crime is not monolithic. Many incidents meet the statutory elements of a violent crime, that is, the use of force or attempted use of force against another person or person's property, and yet prosecution may not serve the interests of society at large, the complaining witness, or, certainly, the accused.<sup>2</sup> In many instances in which the crime is not deemed serious enough to warrant punishment, the accused pleads guilty and receives a sentence of probation. In some instances, the prosecution offers the defendant a diversionary program in lieu of court.<sup>3</sup>

At the same time, one can find examples of neighborhoods throughout the United States in which seemingly minor conflicts can escalate into cycles of retaliation.<sup>4</sup> Consider the following: A fight between two middle school students led school police officers to arrest one student and charge him with assault in juvenile

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1. See generally James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 47–48 (2012) (estimate calculated from Bureau of Justice statistics 2006–2009).

2. I use the term “violence” here broadly to encompass any act that involves physical force or the threat thereof. 18 U.S.C. § 16 (1984) defines a “crime of violence” as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature involves a substantial risk that physical force against the person or property of another may be used in the court of committing the offense.”

3. Discussed *infra* Section I.B.

4. See TA-NEHISI COATES, *THE BEAUTIFUL STRUGGLE: A FATHER, TWO SONS AND AN UNLIKELY ROAD TO MANHOOD* 3, 27, 29–30, 176–77 (2008) (describing, from a thoughtful first person perspective, the potential for neighborhood violence and its effect on the narrator as a child).

court. The school notified the parents of the students who fought, which led to a confrontation between the families of the students. A parent of one of the children shot a parent of the other child, and was charged with attempted murder.<sup>5</sup>

Responding to a fight between students with an arrest can result in increased conflict between the students and the families of the students. Without a forum to address the fight and the grievances of the parents, a minor schoolyard fight ended in a conflagration. This illustrates the way in which the criminal and juvenile<sup>6</sup> justice systems often polarize people in conflict, fail to increase public safety, and, ultimately, fail to reduce recidivism.<sup>7</sup> It also begs the query as to whether alternatives exist that would allow the people involved in violent incidents to resolve the conflict and prevent further violence.

At the same time, it may be difficult to imagine alternatives to criminal prosecution and punishment in cases that allege an act of violence. We cannot decriminalize violence, but we can develop alternatives to prosecution that acknowledge that out-of-court resolution is often successful and may be an appropriate avenue of quasi-decriminalization. At first blush, restorative justice appears to offer an alternative to criminal prosecution. Restorative justice is a widespread and influential concept and practice shaping out-of-court dispute resolution in criminal and juvenile cases. With its sweeping language, it appears to decriminalize violent crime by recasting it as interpersonal harm capable of resolution through an out-of-court dialogue between the victim and offender.<sup>8</sup> A

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5. See, e.g., Nick Madigan, *Two Charged with Attempted Murder in Dundalk Shootings*, THE BALTIMORE SUN (Apr. 14, 2011) (describing such an incident of a shooting that took place in Baltimore, Maryland), [http://articles.baltimoresun.com/2011-04-14/news/bs-md-shooting-police-chase-20110414\\_1\\_police-lieutenant-police-cars-shooting](http://articles.baltimoresun.com/2011-04-14/news/bs-md-shooting-police-chase-20110414_1_police-lieutenant-police-cars-shooting). I have taken the liberty to add details and alter the facts based on my experience with similar cases while facilitating community conferences for youth charged as juveniles in Baltimore between 2010 and 2013.

6. Throughout this article, I do not draw a distinction between the juvenile and criminal courts but instead treat them as part of the same system of prosecution of crime. Although the juvenile court movement was intended to provide an informal setting in which a judge, acting under the doctrine of *parens patriae*, administers non-punitive alternatives to the adult criminal justice system, it has long been recognized that the juvenile justice system investigates, charges, prosecutes, and often punishes in a manner indistinguishable from the criminal court. *In re Winship*, 397 U.S. 358, 368 (1970) (applying the standard of proof of “beyond a reasonable doubt” to juvenile delinquency cases); *In re Gault*, 387 U.S. 32, 41, 55, 57 (1967) (holding that due process rights, such as the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses, apply to juvenile delinquency proceedings). Restorative justice programs have gained more of a foothold in the juvenile justice system than in the adult criminal justice system because of the juvenile justice system’s rehabilitative mandate. See Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543 (2004) (discussing the intersection of the rehabilitative goals of juvenile justice and the emerging practice of restorative justice based on surveys of the United States, Australia, New Zealand, and thirteen European countries). For the purposes of this article, however, the discussion of the application of restorative justice to adult and juvenile court settings runs parallel.

7. Criminal sanctions without further treatment slightly increase the chances of recidivism. See, e.g., Paula Smith, Claire Goggin & Paul Gendreau, Dep’t of Psychology & Centre for Criminal Justice Studies Univ. of New Brunswick, Saint John, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (2002) (Canadian study) [http://ccoso.org/library%20articles/200201\\_Gendreau\\_e.pdf](http://ccoso.org/library%20articles/200201_Gendreau_e.pdf).

8. See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990) (providing an early account of the theoretical framework of restorative justice as an alternative to the criminal justice system).

comprehensive look at restorative justice reveals, however, that many restorative justice programs narrowly define their goals according to a fixed agenda regarding the needs of “victims” and “offenders.”<sup>9</sup> Like criminal specialty courts,<sup>10</sup> it functions as an adjunct to the criminal justice system while simultaneously denying its enmeshment in traditional probationary and sentencing regimes.<sup>11</sup> As it is currently formulated, restorative justice is a sentencing theory, and one that may be beneficial to our system of criminal justice, but one that does not offer an alternative to that system.

Thus, despite the widespread acceptance of restorative justice as an alternative in criminal cases, it often fails to offer an actual substitute for the criminal court system. Instead, restorative justice often functions as a therapeutic adjunct to prosecution that seeks to promote offender “accountability” and victim healing.<sup>12</sup> This focus pre-determines the outcome of any dispute resolution encounter, an anathema to mediation practice, which permits the parties to determine the outcome.<sup>13</sup> The therapeutic focus of restorative justice makes it inapplicable in any instance in which the accused’s culpability is uncertain or deserving of more nuanced interpretation. Finally, the rhetoric of restorative justice masks the influence that the criminal justice system has on out-of-court dialogue, including the potentially coercive effects of the threat of prosecution.

Although diversionary programs carry the inherent risk of coercing the defendant’s compliance, out-of-court dispute resolution may be worthy of consideration for many cases alleging violent crime. Enthusiasm for restorative justice as the best method of out-of-court dispute resolution in criminal cases, however, should be tempered in favor of mediation, which is neutral because it does not assume that the accused is guilty and that “healing” or repair is warranted. Because decriminalization is not complete and the state retains jurisdiction, a neutral mediation program should (1) function to reduce overall contact with the criminal courts and (2) include procedural safeguards in acknowledgment of the coercive effect of the threat of prosecution.

Part I of this article explores the feasibility and desirability of resolving crimes of violence outside of the criminal justice system. Diversionary dispute resolution is framed as a type of quasi-decriminalization that can be evaluated in light of its ability to meet the goal of reducing contact with the criminal justice system while mitigating the coercive effect of the threat of prosecution. With the

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9. See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 774 (2000) (providing comprehensive critiques of victim-offender mediation as the most commonly used form of restorative justice).

10. See Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004) (providing a thorough discussion and critique of the development of problem solving courts within the juvenile and criminal context).

11. See, e.g., WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT TOWARDS A THEORY OF RESTORATIVE JUSTICE* (1992) (discussing restorative justice entirely within the context of sentencing).

12. *Id.* at 32, 40.

13. CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL*, 226–27 (Vicki Been et al. eds., 2nd ed. 2011).

proper procedural safeguards, out-of-court dispute resolution may be a viable option in criminal cases even in light of critiques of informal dispute resolution.<sup>14</sup>

Part II examines two strands of restorative justice that undermine its ability to provide an alternative to criminal court—first, its therapeutic agenda and second, its claim that it functions separately from the criminal justice system. Restorative justice is measured against mediation as it is practiced in civil contexts, highlighting the limits of restorative justice in providing an adequate model for resolving the wide array of conflicts that present as criminal charges in court. The rhetoric of restorative justice is critiqued for its tendency to mask its function as an instrument of public prosecution and state sanctions.

Part III lays out the elements of an alternative to restorative justice, a neutral form of mediation that could serve as a diversion from criminal court and as an alternative to restorative justice. By providing procedural protections, neutral mediation could offer both a meaningful form of dispute resolution and serve as a form of quasi-decriminalization for many criminal charges. Recommendations include the involvement of due process professionals in the design and implementation of criminal mediation programs to meet the goals of (1) reducing overall contact with the criminal courts and (2) providing procedural safeguards in acknowledgment of the coercive effect of the threat of prosecution.

Part IV discusses potential objections to a system of mediation as an alternative to prosecution for instances of violent crime, including objections that might be brought by critics of informality regarding both the rights of the accused and the safety and support of victims.

## I. QUASI-DECRIMINALIZATION: DIVERSION AND THE DECISION NOT TO PROSECUTE

### A. The Decision Whether to Prosecute

Crime can be viewed as a construct that we use to interpret and categorize certain actions. As criminologist Nils Christie eloquently puts it, “Crimes are in endless supply,”<sup>15</sup> because “[c]rime does not exist. Only acts exist, acts often given different meaning within various social framework.”<sup>16</sup> When a legislature criminalizes an act, it does so because the act is deemed to be not just harmful, but also morally wrong and deserving of punishment.<sup>17</sup> Yet, in practice, it is difficult to

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14. Delgado, *supra* note 9; Brown, *supra* note 9. See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1390–91 (1985) (providing a more general critique of alternative dispute resolution); see also Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073 (1984).

15. NILS CHRISTIE, A SUITABLE AMOUNT OF CRIME 3, 10 (2004).

16. Christie goes further to suggest that governments constantly attempt to broaden the ambit of criminal law in an attempt to shore up power, particularly when state authority and power is shrinking in other areas. *Id.* at 10. For governments seeking to increase revenue and the appearance of efficacy and strength, “[a]cts with the potentiality of being seen as crimes are an unlimited natural resource.” *Id.*

17. Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L. J. 315, 346–48 (1984) (discussing moral blame as critical to deterrence). See also Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1819 (1999) (discussing theory of punishment as atonement for a moral wrong).

draw a line that circumscribes only actions that we deem morally wrong and deserving of punishment, and excludes actions that harm individuals that can adequately be addressed without state prosecution and punishment.<sup>18</sup>

The Supreme Court has stated that punishment, administered through sentencing, is designed to serve four distinct goals: retribution, deterrence, incapacitation, and rehabilitation.<sup>19</sup> In reflecting on the wide array of misdemeanor and felony cases prosecuted in criminal and juvenile courts every day, it would seem that not every incident that can be charged as a crime demands punishment designed to serve these four goals. The state's interest in many cases may be simply to ensure that the harm or injury is addressed to the complainant's satisfaction, or to ensure that the peace is kept.<sup>20</sup> Consider the following examples:<sup>21</sup> (1) A and B are 17-year-old neighbors and high school classmates. B attempts to seduce A's underage sister. A confronts B, pushes him to the ground and takes B's cell phone out of his backpack in order to delete A's sister's cell phone number from B's list of contacts. B reports to the police that A assaulted him and took his phone. A is charged with unarmed robbery. (2) A and B are married, but in the midst of separation. During a heated argument, A throws a cup of hot coffee at B, which misses, and B throws a lamp at A, which hits A in the face causing a laceration. B is charged with assault with a dangerous weapon, *to wit*, a lamp.

The above are examples of instances in which the lines are blurred between victim and offender or the culpability of the offender is called into question by the circumstances. Yet, if proven, the facts underlying both examples make out the elements of crimes of violence, which are broadly defined to include the use of force, or the threat of the use of force against another person or person's property.<sup>22</sup>

In many cases, the complaining witness may seem less of a witness and more of a litigant enlisting the help of a prosecutor. In her article examining the role of interpersonal power in the criminal justice system, Professor Kimberly Thomas analyzes the daily fare of the criminal misdemeanor docket. She points out that, in over fifty percent of crimes of violence, the defendant and complaining

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18. Within the federal system, for example, the proliferation of legislation criminalizing various actions defies simple explanation. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514–15 (2001) (In 1873, the United States Code contained 183 crimes; it contained “almost certainly over one thousand” crimes by the year 2000.).

19. *Tapia v. United States*, 131 S. Ct. 2382, 2387–88 (2011) (discussing the four goals of punishment within the context of the Sentencing Reform Act, which precludes federal courts from imposing or lengthening a prison term for the purpose of rehabilitation).

20. According to the National Prosecution Standards promulgated by the National District Attorneys Association, “prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest.” NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS, 4-1.3 (3rd ed. 2009), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>. Factors include, *inter alia*, “the availability of adequate civil remedies,” “the availability of suitable diversion and rehabilitative programs, ‘provisions for restitution’ and ‘whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction.’” *Id.*

21. These examples are taken from my cases when practicing as a public defender from 1999 through 2007. All examples were charged initially as felonies.

22. *See, e.g.*, 18 U.S.C. § 16 (1984) (federal definition of a “crime of violence”).

witness are not strangers.<sup>23</sup> They are often engaged in some form of ongoing familial, friendship or intimate relationship. While abusive relationships account for some of the criminal charges,<sup>24</sup> other interpersonal conflicts may challenge the boundaries of criminal law because they involve no clear perpetrator or victim.<sup>25</sup> Because many people may lack access to the civil justice system or face barriers to accessing social services, they may call the police or submit a citizen's complaint when faced with an interpersonal conflict that they cannot resolve on their own.<sup>26</sup> This occurs, for example, in instances in which a family member with mental health issues refuses treatment and becomes violent, or when an unwelcome friend or relative refuses to move out of the house.<sup>27</sup> In cases such as these, the use of the criminal justice system to re-balance interpersonal power produces unintended consequences. The aggrieved person loses almost all power over the course and outcome of the prosecution, and the defendant is labeled a criminal.<sup>28</sup>

While a full analysis and discussion of the distinction between torts and crimes is beyond the scope of this paper, it bears mentioning that the two approaches have not developed in mutual exclusivity.<sup>29</sup> The overlap between a tort and a crime is inevitable in cases involving violence. An assault, for example, gives rise to both

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23. Kimberly Thomas, *Interpersonal Power in the Criminal System*, 50 AM. CRIM. L. REV. 247, 248 (2013) (analyzing citizen's use of the criminal justice system to leverage interpersonal power due to a lack of other avenues of relief or assistance) (citing JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2010, at 9 (2011), <http://bjs.gov/content/pub/pdf/cv10.pdf>).

24. I do not address intimate partner violence or domestic violence as a separate category of violent crime except *infra* at n.37, but instead proceed from the assumption that intimate partner violence is not monolithic, and that people involved directly in such circumstances may have a variety of interests and goals regarding the outcome of the cases. See Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 45–50 (2009); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009); Leigh Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) (arguing that not all incidents of intimate partner violence are products of cycles of abuse and not all victims of intimate partner violence would choose to criminally prosecute if given the choice). See also Laurie J. Kohn, *What's so Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517 (2010) (exploring the use of restorative justice to address domestic violence).

25. Thomas, *supra* note 23, at 248–49.

26. Professor Thomas' observations apply with equal force to the school context. Schools lacking adequate resources and internal support often utilize the juvenile justice system to respond to behavioral problems with students that result in fights, vandalism or theft. See, e.g., Kristen Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of the Prosecutor in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) (discussing the prosecutor's decision whether and how to prosecute actions of juveniles that might otherwise be characterized as childhood discipline problems).

27. Thomas, *supra* note 23, at 252–55.

28. *Id.* at 267.

29. See, e.g., David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996) (discussing the distinction between crime and tort and the overlapping interests of the alleged victims and the king). The idea of the state as the victim was not, from an historical perspective, a foregone conclusion. Even with the eleventh century advent of crimes against the King's peace, most instances of harm against person or property could and can still be pursued both privately for compensation and publicly for vengeance.

a criminal charge of assault and the civil tort of assault and battery.<sup>30</sup> If the assailant and victim are in an intimate relationship, the victim of the assault may also avail himself of another civil remedy, the protective order.<sup>31</sup>

Thus, while legislatures can decriminalize drugs and “victimless crimes” by removing an offense from the criminal code, it is much more likely that the executive branch will simply choose not to prosecute certain crimes of violence.<sup>32</sup> Indeed criminalization draws heavily on the discretion of the executive branch regarding what actions to prosecute.<sup>33</sup> Broad and overlapping criminal laws demand that the prosecutor exercise discretion regarding whether to initiate prosecution and, if so, what crimes to charge.<sup>34</sup>

The decision not to charge or prosecute an act of violence is an act of quasi-decriminalization.<sup>35</sup> Quasi-decriminalization occurs when the police do not investigate or bring charges for a particular act despite the existence of probable cause. This often happens on a systemic level when an act is no longer perceived as wrong or socially pernicious yet remains a crime by law.<sup>36</sup> It may also happen systemically as a form of injustice, such as the routine and pervasive failure to prosecute intra-family violence prior to the movement to recognize domestic violence as a crime.<sup>37</sup> On a routine basis, police and prosecutors decline to charge

30. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 16.3 (2d ed. 2003) (defining elements of criminal assault); *RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS* § 103 (Am. Law Inst., Tentative Draft No. 1, 2015) (defining elements of tortious assault). *See also* *RESTATEMENT (SECOND) OF TORTS* § 13 & cmt. d (Am. Law Inst. 1965).

31. 25 AM. JUR. 2D *Domestic Abuse and Violence* § 20 (2015).

32. Now familiar instances of decriminalization have occurred in response to shifts in our society’s view of morality, particularly regarding sex and drugs. *See* Stuntz, *supra* note 18, at 557. Decriminalization can also occur in instances in which a court determines the criminalization of an act unconstitutional. *See e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a Texas statute criminalizing sexual acts between people of the same sex unconstitutional under the Due Process Clause).

33. Prosecutors have “virtually unfettered power to make momentous choices that can destroy a person’s reputation, liberty, and even life itself.” Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 *FORDHAM URBAN L.J.* 513, 513–14 (1992); *see also* U.S. DEP’T OF JUSTICE, OFFICE OF THE U.S. ATTORNEYS, *UNITED STATES ATTORNEYS’ MANUAL* tit. 9, § 2.020 (1997), <http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.020> (“The United States Attorney is authorized to decline prosecution in any case referred directly to him/her by an agency unless a statute provides otherwise.”) (last visited Oct. 23, 2015).

34. The relationship between the proliferation of statutes creating new crimes and prosecutorial discretion can be described as reciprocal. Legislative bodies may enact an endless array of legislation criminalizing various acts secure in the knowledge that the prosecutor will select only the appropriate charges in the appropriate instances. The prosecutor relies on the proliferation of statutes creating new crimes to increase the state’s charging options. Bringing an array of charges against one defendant for the same action enhances the prosecutor’s bargaining power in plea negotiations thereby reducing the cost of prosecution. *See* Stuntz, *supra* note 18, at 519–20.

35. *See* TONY F. MARSHALL, *ALTERNATIVES TO CRIMINAL COURTS: THE POTENTIAL FOR NON-JUDICIAL DISPUTE SETTLEMENT*, 125–30 (1985).

36. By way of example, “Virginia’s criminal code has a substantial separate section (among the code’s largest) devoted to railroad crime.” Stuntz *supra* note 18, 556 (citing VA. CODE ANN. Sections 18.2-153 to 18.2-167.1 (Michie 1996)).

37. Mandatory charging and arrest laws in domestic violence cases were designed to curb the systemic failure to prosecute intimate partner violence as a crime. *See* Emily J. Sack, *Battered Women*



and prosecute depending on their view of the merits of the incident, the weight of the evidence, the culpability of the accused, and so forth.

Another form of quasi-decriminalization occurs when the state defers prosecution and agrees to dismiss the criminal charges on the condition that the defendant successfully completes a pre-trial diversion program.<sup>38</sup> Diversionary programs represent the least comprehensive form of quasi-decriminalization because the defendant is forced to do something in exchange for avoiding criminal prosecution. Nevertheless, diversion can be considered a form of partial decriminalization because it eschews at least three of the four goals of punishment—retribution, deterrence, and incapacitation.<sup>39</sup> Diversionary programs aim at rehabilitation alone. Defendants are sent to drug and alcohol counseling, anger management courses and other therapeutic interventions designed to prevent re-offense.<sup>40</sup> If the hallmark of crime is punishment, diverting criminal cases pre-trial and foregoing punishment casts doubt on whether we really consider that particular act a crime deserving of punishment.

With regard to crimes of violence, diversion may be the most realistic form of quasi-decriminalization. If the alleged victim has sought the assistance of the state to address a crime of violence, it is doubtful that the prosecutor would, absent some glaring defect in the case, simply decline to prosecute. No doubt people resolve incidents of violence out of court all the time through apology, or informal negotiations, but it is presumed that people call the police or make a citizen's complaint because they are unable to resolve the situation on their own.<sup>41</sup> In his critique of the New Jim Crow theorists' lack of attention to violent crimes, Professor James Foreman sketches a picture of the problem of violent crime in low-income neighborhoods, many of which (although certainly not all) are predominately African American.<sup>42</sup> He notes that in response to violent crime quadrupling between 1959 and 1971, residents of low-income neighborhoods affected by the increase in violence requested more policing and prosecution.<sup>43</sup> Many prosecutors responded to the call for help, conceptualizing themselves as protectors of blighted communities committed to using state power to protect the victims of violence.<sup>44</sup>

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*and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1669–71 (2004).

38. Marshall, *supra* note 35, at 139.

39. See *Tapia*, 131 S. Ct. 2382, 2387 (2011).

40. See U.S. DEP'T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL, PRETRIAL DIVERSION 712(E) (2011), <http://www.justice.gov/usam/criminal-resource-manual-712-pretrial-diversion> (“[S]upervision should be tailored to the offender’s needs and may include employment, counseling, education, job training, psychiatric care, etc. Many districts have successfully required restitution or forms of community service as part of the pretrial program.”) (last visited Oct. 23, 2015).

41. See Thomas, *supra* note 23.

42. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45–46 (2012).

43. Forman, *supra* note 42, at 35–36.

44. See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 24 (2009) (“[By becoming a prosecutor] I was helping people in the most immediate way—delivering the protection of the law to communities that needed it most, making the streets safer, and restoring to victims some measure of the dignity that a punk criminal had tried to steal.”).

Given the call for a state response to violent crime, the prosecutor may be more inclined to aggressively prosecute all cases involving violence and to only refer nonviolent, petty offenses to diversionary programs.<sup>45</sup> Aggressive prosecution of violent crime, however, does not take into account that the perpetrator of an act of violence today may well have been the victim of an act of violence yesterday.<sup>46</sup> Nor does it take into account violent episodes without clear victims and offenders and ongoing conflicts with occasional flares of violence.<sup>47</sup> Moreover, aggressive prosecution often does not consider the needs or wishes of the victims of violent crime.<sup>48</sup> Instead, it contributes to mass incarceration while offering little to address the underlying dynamics that lead to violent crime.<sup>49</sup>

Should the prosecutor determine that an act of alleged violence is inappropriate for prosecution, he or she must ask what other course of action is available. Ideally, diversionary programs resolve the prosecutor's dilemma by allowing the prosecutor a greater array of responses to crime.<sup>50</sup> Within the context of violent crime, the prosecutor could divert the case to a pre-adjudication diversionary program that offers dispute resolution between the complaining witness and the defendant. Examples of such programs include community mediation, community conferencing, and victim-offender mediation, which are discussed *infra* in Sections II and III. Used in the diversionary context, participation in dispute resolution programs is a condition of the decision not to prosecute. In the event that the dispute resolution fails, the case returns to criminal court to be prosecuted.

## B. Diversion and its Discontents

Acknowledging the dangers and limitations of diversionary programs is necessary to set the stage for a discussion of restorative justice and mediation as potential diversionary programs for criminal cases. The two central concerns are (1) that the fear of prosecution has a coercive effect on the defendant participating in a

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45. See, e.g., Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J. L. & POL'Y 91, 103 (2011) (noting that police, prosecutors, and courts "screen out" serious cases as inappropriate for restorative justice).

46. See, e.g., Forman, *supra* note 42, at 51.

47. See Bruce A. Jacobs & Richard Wright, *Bounded Rationality, Retaliation, and the Spread of Urban Violence*, 25 (10) J. OF INTERPERSONAL VIOLENCE 1739 (2010) (explaining the overlap between victims and offenders, particularly in the context of retaliatory violence).

48. A discussion and critique of the victim's rights movement is beyond the scope of this article. Suffice it to say for now that its genesis lies in the belief that the victims of crime have been marginalized unnecessarily from the criminal justice system to the extent that they may never meet with the prosecutor in the case in which they are complaining witness, nor be consulted before a plea bargain is struck. See Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J. L. & POL'Y 229, 239 (2005).

49. See Forman, *supra* note 42, at 48.

50. Within the federal system, one of the stated objectives of pretrial diversion is "[t]o prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services." U.S. DEP'T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL tit. 9, § 22.010, <http://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program> (last visited Oct. 25, 2015). Charges are dropped only upon successful completion of the diversionary program. *Id.* The NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS, §§ 4-3.1 to 4-3.8 (3rd ed. 2009) (commentary further states, "[i]t must be remembered that the individual involved in the diversion process is accused of having committed a criminal act and is avoiding prosecution only because an alternative procedure is thought to be more appropriate and more beneficial").

diversionary program and (2) that diversionary programs may increase involvement with the criminal justice system by mandating more onerous requirements than the defendant might otherwise face. The concerns are discussed below.

1. *Coercion through the fear of prosecution*

The question of the coercive power of the threat of prosecution is foremost. Consider an example in which the prosecuting attorney has diverted to a mediation program a misdemeanor charge of threats and malicious destruction of property. The accused and the complaining witness are next-door neighbors involved in a dispute over the fence separating their properties.<sup>51</sup> The complaining witness alleges that the accused slashed her tires and threatened physical violence. The accused denies these allegations, and counters that the complaining witness has been threatening the accused. Another court date has been scheduled, and both the accused and the complaining witness have been told that the case will be prosecuted if it is not resolved in mediation. The accused will have interacted with the police before the referral and will be required to report back to the court regarding whether the dispute or conflict was resolved. If the complaining witness and defendant agree that the case should be dismissed, their request will be communicated to the prosecutor who will dismiss the case. If the case is not resolved through mediation, it will return to court to be prosecuted like any other misdemeanor case. During the mediation, the accused knows that, should she fail to reach an agreement, she will be prosecuted, and could be convicted and punished. This is so even if, during the mediation, she disputes the factual allegations against her, denying that she threatened the complaining witness or damaged the tires.

This example highlights the problem of coercion in diversionary programs. The accused understands that she will be prosecuted if she cannot reach an agreement that is satisfactory to the complaining witness. The complaining witness may be able to use the threat of prosecution as leverage against the defendant.<sup>52</sup> The accused is put in the position of capitulating with the demands of the complaining witness and, if she does not capitulate, the case will be prosecuted criminally.

There is, at the very least, a whiff of blackmail in this arrangement.<sup>53</sup> It is akin to what Professor Ric Simmons has referred to as a “private plea bargain.”<sup>54</sup> The complaining witness may leverage the threat of prosecution to secure a favorable outcome. Moreover, the problem of the coercive effect of the threat of prosecution is present even in instances in which no charges have been brought. Even in a system in which private mediators resolve would-be crimes before any public law enforcement or prosecutorial involvement, the system of private mediation would remain inextricably linked to the criminal justice system because the state retains

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51. The example is taken from a dispute that the author co-mediated through a community-based mediation program in Baltimore, Maryland in 2013.

52. Brown, *supra* note 9, at 1269. Alternatively, a complaining witness may be loathe to testify in court and may feel pressured to settle in mediation.

53. Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1127–28 (2011) (providing that a complainant may use the threat of criminal prosecution to coerce a private settlement tailored to his or her needs).

54. *Id.*

jurisdiction and remains at liberty to prosecute.<sup>55</sup> The possibility of criminal prosecution is unavoidable so long as the actions alleged make out the elements of crime as defined and enacted by the legislature.

2. *Diversion may increase criminal court involvement*

Another issue with diversionary programs is that they may perversely function to increase the breadth and depth of the defendant's involvement in the criminal justice system. Prosecutors may refer cases to diversionary programs that would otherwise be dismissed, a phenomenon referred to as "net-widening." This is a realistic concern regarding programs that divert cases from court to mediation.

Moreover, an individual defendant may be subject to more requirements in a diversionary program than in traditional sentencing, a phenomenon that can be referred to as "net-deepening" or "net-strengthening."<sup>56</sup> In his detailed observations of traditional misdemeanor courts, Professor Malcolm Feeley expounded upon the ways in which multiple court appearances and conditions of release or detention create an experience of punishment for the defendant long before conviction or sentencing.<sup>57</sup> Pretrial diversionary programs augment monitoring and conditions of release even as they supplant the process of adjudication. They often require the defendant to "undergo a regime of social control" that is in excess of any requirements that would be ordered as a condition of probation after conviction.<sup>58</sup> In any individual case, the defendant's engagement in the criminal justice system may be deepened and extended by diversion despite its promise of relief from prosecution, conviction and punishment.

Criminal specialty courts, or "problem solving" courts, provide clear examples of the manner in which the attempt to avoid over-use of the criminal justice system often accomplishes the opposite: net-widening and net-deepening. Defendants in specialized courts such as drug courts are often subject to numerous court appearances, onerous terms of probation,<sup>59</sup> and the embarrassment of discussing one's addiction or emotional and behavioral problems with a judge in an open courtroom. Moreover, if the defendant fails to comply with the terms of the rehabilitative regimen, he or she may be subject to repeated terms of incarceration.<sup>60</sup>

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55. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 958 (2007). Professor Simmons discusses the possibility of a private mediation system modeled on restorative justice practices that could resolve criminal cases before they reach court and the ongoing implications of criminal jurisdiction over any acts that could be charged as crimes. *Id.* at 917–18, 960.

56. The term "net-strengthening" is used by Ruth Morris in *Not Enough!*, 12(3) MEDIATION QUARTERLY 285, 287 (1995). She refers to the judicial practice of ordering the defendant to comply with numerous requirements and conditions as the "Dagwood-sandwich approach to the use of alternatives," which "makes punitive many community interventions that are intended in other ways." *Id.* at 288.

57. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

58. *Id.* at 176.

59. The defendant also likely chose to participate in the specialty court without knowing the exact terms of probation or treatment that the judge would order. Tamar M. Meekins, "*Specialized Justice*": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 20–21, 39–40 (2006).

60. *Id.* at 16, 18, 19, 22; Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 264 (2008) (describing "coercive power" as "central to the therapeutic problem-solving court model" in family and juvenile courts).

The net-deepening concerns apply to criminal specialty courts, but do they apply to an out-of-court dispute resolution process such as mediation? The answer is equivocal. A diversionary dispute resolution process would not necessarily lead to increased entanglements with the criminal courts due to important differences between the two. In most problem solving courts, the judge sets the terms of probation or treatment, directs the proceedings, makes direct inquiry of the defendants, directly monitors defendants' compliance, and imposes sanctions for noncompliance.<sup>61</sup> In contrast, mediation functions to supplant courtroom proceedings with private meetings facilitated by a mediator.<sup>62</sup> The communications that occur in the mediation process are generally considered confidential and are not shared with the court.<sup>63</sup> No judge is present to set terms and conditions, and any commitments for further action are agreed upon. In many jurisdictions, mediators do not even suggest terms of agreement.<sup>64</sup> The defendant retains the power to negotiate and, most importantly, to decline the terms proposed by the complaining witness and request that the case be returned to court. The minimal involvement of the judge and the absence of public proceedings distinguish diversion programs that offer out-of-court conflict resolution from specialty courts that monitor and control defendant's behavior.<sup>65</sup>

On the other hand, when asking if a diversion program increases or decreases contact with the criminal court system, several areas of concern emerge for criminal cases. If the mediation agreement fails, the consequence would likely be the reinstatement of prosecution. If the defendant is not successful in meeting all of the complaining witness' demands, he will return to court to be prosecuted after having spent a considerable amount of time and effort attempting to resolve the case out of court. The alternative process itself could be more onerous than court, particularly if the process includes numerous meetings that result in time consuming or expensive tasks.

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61. Another comparison can be made regarding the status of the case at the time of referral. The judge in many criminal specialty courts functions as enhanced probationary supervision. See John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L. J. 97 (2007) (discussing a judge's perspective on his role in drug court as effectively fulfilling the role traditionally performed by the probation officer by monitoring defendant's behavior post-adjudication).

62. See discussion *infra* Section III.

63. The extent of confidentiality and mediator privilege varies according to jurisdiction. See Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943 (2008) (discussing the criminal exception to confidentiality and privilege in mediation).

64. In Maryland, for example, mediators may not "recommend the terms of an agreement." MARYLAND RULE § 17-103.

65. Here, I envision a mediation program similar to mediation in the civil context, which would entail one or two mediation sessions and no more. As discussed *infra* Section II.A, therapeutically oriented restorative justice programs can become as onerous and demanding of the defendant's time as problem-solving courts. Out-of-court dispute resolution through some restorative justice programs can require multiple appearances and obligations. For example, the Vermont Reparative Probation Board, requires the defendant to attend intake, orientation, two or three meetings with the Board, attending classes required by the Board, and writing a personal essay. The process occurs over a 90-day period. See Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 66-68 (2003).

The way out of the over-use of the criminal justice system is not easy to navigate. Whether diversionary programs increase or decrease the ambit of the criminal courts depends on variables that may be specific to the selected diversionary program. It follows that any program attempting to offer diversionary, out-of-court dispute resolution of criminal matters should take as its litmus test whether it is actually reducing the defendant's involvement with criminal justice system.<sup>66</sup> More specifically, the success of a diversionary program that offers out-of-court dispute resolution should be measured against the goals of (1) reducing the ambit of the criminal justice system while (2) protecting against the coercive influence and process dangers of the criminal justice system.

### C. Is it Worth it?

Given the hazards of diversionary programs, it is worth pausing to ask whether it is worthwhile to pursue the possibility of out-of-court dispute resolution in criminal cases involving claims of violence, and to articulate the potential benefits. The most obvious benefit to both the defendant and the complaining witness might be to avoid the psychological and temporal costs of criminal court. Both the defendant and the complaining witness may be relieved to avoid a protracted litigation process that involves numerous court appearances and, for the defendant, invasive pre-trial conditions of release.<sup>67</sup> The complaining witness may be relieved to avoid testifying as a witness in open court and being subject to cross-examination.<sup>68</sup> When offered as a diversion from prosecution, out-of-court dispute resolution allows the defendant to avoid conviction as well as the collateral consequences that follow convictions for certain offenses in the areas of immigration, public benefits, employment opportunities, educational benefits, and enhanced penalties should the defendant face future criminal charges.<sup>69</sup>

The privacy of out-of-court dispute resolution avoids the publicity, or potential publicity, that can result from public prosecution. Although much can be said for a public process, and much has been said for the protections attendant to dispute resolution in a public forum,<sup>70</sup> informality can be an advantage. Wealthy individuals avoid becoming defendants in criminal and juvenile cases whenever possible by hiring attorneys to negotiate private resolutions that occur sometimes

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66. See, e.g., Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L. J. 1587 (2012) (discussing the concept of a "decarceration" model for problem solving courts, which aims to reduce incarceration rates by reducing the scope of instances of "social disruption" that we treat as crimes).

67. Arrest, arraignment, pre-trial court dates, continuances engage the defendant in hours of interaction with the criminal justice system. As a result, the cost of asserting one's right to trial and to due process at each stage of the proceeding may seem less desirable to a defendant facing misdemeanor charges than a plea of guilty with an agreed upon fine or term of probation. See FEELEY, *supra* note 57, 25–26 (1979).

68. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005) (providing a critique of cross-examination of the complaining witness in criminal prosecutions).

69. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (reviewing a list of possible collateral consequences of misdemeanors, including deportation for noncitizens, sex-offender registration, and eviction from public housing).

70. Fiss, *supra* note 14; Delgado, *supra* note 9.

before charges have been filed. An out-of-court negotiation may be the best option if either the accused seeks to avoid notoriety or the victim seeks to avoid a public process in which he or she will be identified and cross-examined as a witness.<sup>71</sup>

Turning to the potential intrinsic value of out-of-court dispute resolution, data suggest that defendants and complaining witnesses are usually satisfied with restorative justice and mediation programs. Because restorative justice is the primary form of out-of-court dispute resolution in criminal and juvenile cases, most of the available data derive from restorative justice effectiveness studies. Meta-analysis of studies of restorative justice demonstrates significantly higher satisfaction levels for victims who participated in restorative justice programs compared with those who participated in criminal court proceedings,<sup>72</sup> and at least slightly higher satisfaction rates for defendants.<sup>73</sup> Studies show that victims of crime perceive the proceedings to be fair, and appreciate the opportunity to speak directly to the defendant.<sup>74</sup> Other studies have found high levels of satisfaction for defendants who participate in restorative justice, as well as the perception that the process is fairer than criminal court proceedings.<sup>75</sup> These findings may reflect that participants in out-of-court dispute resolution experience the subjective feeling of “procedural justice,” the hallmarks of which are the opportunity to express one’s views, to have one’s views considered by another, and to be treated in an even-handed and dignified manner.<sup>76</sup>

Satisfaction and the perception of fairness may derive in part from the tendency of face-to-face dispute resolution to restore participants’ sense of subjectivity and agency. In contrast to court, where rules define the process and where facts are shaped by attorneys in accordance with substantive and procedural law, participants in mediation decide what happened, what it means, and what should happen next.<sup>77</sup> Although the mediation participants’ perspectives may be informed

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71. The interaction between the complaining witness and the criminal justice system has been described as a “secondary victimization.” Douglas E. Beloof, *Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1150 (2007) (discussing the phenomenon of “secondary victimization” within the context of advocating for judicial consideration of the rights and interests of victims during criminal court proceedings).

72. Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 THE PRISON JOURNAL 127, 136 (2005). See also Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 201 (2003) (providing an analysis of seven studies evaluating psychological indicators for victims, including “fairness, accountability, satisfaction, contrition and forgiveness, emotional well-being, and feelings of safety,” and concluding that better outcomes in restorative justice than in traditional court proceedings).

73. *Id.* at 136; satisfaction is generally interpreted as the feeling that the experience went as well as or better than expected, and that the participant’s subjective needs were met through the process. See Walgrave, *supra* note 45, 100.

74. LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE, at 62–64 (2007).

75. Walgrave, *supra*, note 45, 109 (citing an 87.7% offender satisfaction rate in James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE, 114 (Dennis Sullivan & Larry Tiff eds., 2006)).

76. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 Wash. U. L.Q. 787, 817 (2001).

77. Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 63 (2010).

by their ideas about the law, they are not limited by doctrines of relevance and admissibility, nor controlled by the legal norms of rehabilitation and punishment.<sup>78</sup>

Out-of-court dispute resolution removes the accused from the ambit of the criminal court, its judgment and sanctions, and its objectification of the “criminal.” In the mediation process, the defendant can express his or her perspective and offer a narrative version of events. “Meaning-making,” as well as decision-making, is within the bailiwick of the accused. In restoring a modicum of autonomy to the defendant, his role expands beyond the role of criminal, the object of prosecution.<sup>79</sup> Likewise, the mediation process offers the complaining witness a sense of agency and control over the outcome.<sup>80</sup>

Moreover, out-of-court dispute resolution may disrupt cycles of violence. The outcome of an adversarial trial, whether it is an acquittal or a conviction, may do nothing to reconcile people involved in the litigation and may instead exacerbate tension and strife. Although, in theory, the act of punishment is intended to assuage the desire for vengeance,<sup>81</sup> one is hard-pressed to find evidence that criminal court proceedings reduce retaliatory violence.<sup>82</sup> Even if retaliatory violence is not a serious concern in a particular case, any incident that leads to criminal charges is likely to tax preexisting relationships, which may be repaired through a mediation-like process. The suggestion here is not that a dramatic shift of hate to love or vengeance to forgiveness is likely to occur, but rather that an incremental cooling of a conflict may be desirable if it reduces the potential for violence. In this regard, it is worth noting that individual restorative justice programs that offer pre-adjudication diversion report levels of resolution or agreement averaging over 95%, suggesting that defendants and complaining witnesses often are able to resolve criminal cases out of court to their mutual satisfaction.<sup>83</sup>

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78. *See id.* at 65, 80.

79. *See id.* at 79–80, 86–87.

80. I do not address the movement to increase the rights of victims in traditional criminal prosecutions. For such a discussion see David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims Rights Act of 2004*, 28 PACE L. REV. 623 (2008) (providing an overview of the movement and its legislative successes).

81. This was the position taken by the majority of the Supreme Court in *Gregg v. Georgia*, as a justification for the continued viability of the death penalty. 428 U.S. 153, 183 (1976) (“When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.” (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972))). The belief articulated by the Court in *Gregg* has yet to be empirically supported. Such empirical evidence may be impossible to collect, but evidence suggests that the relationship between offender punishment and victim’s desire for revenge is not clear. *See, e.g.*, Ulrich Orth, *Does Perpetrator Punishment Satisfy Victims’ Feelings of Revenge?* 30 AGGRESSIVE BEHAVIOR 62, 68 (2004) (concluding that punishment offers only partial and transitory relief from feelings of revenge and does not provide an empirical justification for punishment).

82. *See, e.g.*, Robert C. Solomon, *Justice v. Vengeance, On Law and the Satisfaction of Emotion*, in THE PASSIONS OF THE LAW 123, 123–48 (Susan A. Bandes ed., 1995) (discussing the theoretical relationship between justice and vengeance).

83. *See* Mark S. Umbreit & Marilyn Peterson Amour, *Restorative Justice and Dialogue: Impact, Opportunities and Challenges in the Global Community*, 36 WASH U. J. L. & POL’Y 65, 71 (2011) (discussing 98% rate of agreement for community conferences held to resolve juvenile cases through the Community Conferencing Center of Baltimore).



The foregoing data supporting the advantages of out-of-court dispute resolution are of limited value because they attempt to draw general conclusions from widely divergent programs. In this regard, the empirical data on restorative justice practice are said to be “a mile wide, but only an inch deep.”<sup>84</sup> The independent variables differ depending on the characteristics of the individual restorative justice program, and the criteria for evaluation vary from study to study as well.<sup>85</sup> Whether the benefits of out-of-court dispute resolution outweigh its risks thus likely depends on the specifics of the dispute resolution program.

## II. THE LIMITS OF RESTORATIVE JUSTICE AS AN ALTERNATIVE

Restorative justice does not offer a unified vision for design and implementation of its principles in practice.<sup>86</sup> Consequently, restorative justice programs vary so greatly as to make a comprehensive critique difficult. An overview of the history, rhetoric and current practices of restorative justice, however, reveals at least two recurring themes. One theme suggests a therapeutic response to harm. It assumes guilt and simply seeks to re-route the response to the crime in ways that benefit victims and offenders according to its prescription for a cure.<sup>87</sup> Another theme suggests that it is both possible and desirable to allow people involved in a criminal case to resolve the case outside of court through a process of informal dispute resolution. As described below, the two themes may often be at odds with each other, reducing restorative justice’s effectiveness in providing an alternative to criminal court. By tethering itself to a therapeutic response to crime, restorative justice compromises its ability to offer out-of-court dispute resolution that reduces contact and involvement with the criminal court system. Instead, restorative justice is increasingly positioning itself as a sentencing theory and practice, to be used as an adjunct to criminal prosecution.

### A. Two Agendas: Therapeutic Outcomes and Informal Dispute Resolution

Restorative justice first appeared in the U.S. criminal justice system as a therapeutic intervention rather than as a form of dispute resolution. In the early 1970’s, Mennonite and Quaker volunteers working with probationers and prisoners charged the criminal justice system with both a lack of attention to the needs of the victim of the crime and a lack of attention to the reintegration of the offender back into the community.<sup>88</sup> The first restorative justice experiment in the American common law tradition is thought to have taken place in Kitchener, Ohio in 1974, when a probation officer suggested in a pre-sentencing report to the court that an

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84. Paul McCold, *A Survey on Assessment Research on Mediation and Conferencing*, REPOSITIONING RESTORATIVE JUSTICE 67, 106 (Lode Walgrave ed., 2003).

85. Walgrave, *supra* note 45, 98–101.

86. MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* xxv (2001).

87. As discussed *infra* Part II.A.2., proponents of restorative justice use the term “accountability” rather than “guilt,” but the effect is the same in that the responsibility for the act leading to criminal charges lies squarely with the defendant. ZEHR, *supra* note 8, at 73.

88. Olson & Dzur, *supra* note 65, at 143.

encounter with the victims might have “therapeutic value” for two young men who had pleaded guilty to vandalism.<sup>89</sup> The encounter took place, followed by the payment of an agreed-upon amount of restitution under the supervision of the probation department. The outcome was widely viewed as a success and the method was emulated in other locations over the next two decades. By the end of the 1990’s, 1,500 programs claiming to offer restorative justice practices had been established throughout North America.<sup>90</sup>

The Kitchener experiment set the stage for the manner in which restorative justice would unfold within the criminal justice system. The benefit to victims is both therapeutic and material. They have an opportunity to express themselves to those who have caused them harm, and the opportunity to be compensated for their losses.<sup>91</sup> The benefit to the offenders is also therapeutic. It offers the offender the opportunity to make amends, to learn accountability, to develop empathy for others and, ideally, to experience forgiveness. Restorative justice promises the therapeutic benefit of healing from a crime and reintegrating into society, and it critiques the criminal justice system for failing both victims and offenders in this regard.

Beyond therapeutic outcomes, restorative justice’s second agenda proposes that incidents that the state deems crimes could be resolved through an out-of-court dispute resolution process in which the victim negotiates the disposition of the case directly with the defendant. Restorative justice proponents draw on the traditions of conflict resolution practiced in other cultures and time periods to demonstrate the possibility of viable alternatives to modern criminal court. In this view, restorative justice offers something similar to mediation—an opportunity for the people directly involved to craft an agreement that resolves the case out of court.<sup>92</sup> The embedded assumption is that the state system of justice does not meet the needs or interests of the people affected by the incident of harm and, as a consequence, the state’s purview should be limited.

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89. Dean E. Peachey, *The Kitchener Experiment*, in *A RESTORATIVE JUSTICE READER*, 75 (Gerry Johnstone ed., 2013).

90. Ross London, *A New Paradigm Arises*, in *A RESTORATIVE JUSTICE READER*, 5, 7 (Gerry Johnstone ed., 2013).

91. Restorative justice literature rarely uses the word therapeutic, and the use of the term here is my interpretation of the literature’s use of the word “healing,” and its description of the benefits of restorative justice to people involved in or affected by crime. ZEHR, *supra* note 8, at 51. The use of the term “therapeutic” inevitably calls to mind another area of scholarship, therapeutic jurisprudence. *See generally* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996). Professor Wexler describes therapeutic jurisprudence and restorative justice as “key vectors” within a larger movement to humanize the legal system. Restorative justice and therapeutic jurisprudence, he writes, “are obviously different from each other, and yet they share certain characteristics relating to the promotion of human well-being.” David B. Wexler, *Restorative Justice and Therapeutic Jurisprudence: All in the Family*, *RESTORATIVE JUSTICE TODAY* 27, 28 (Katherine S. Van Wormer & Loren Walker eds., 2013). This article will not discuss the relationship between the two areas of scholarship, but will refer to therapeutic jurisprudence when it is specifically treated in the restorative justice or criminal justice literature.

92. Howard Zehr discusses the value of the victim and offender arriving at an agreement out of court, although the discussion remains embedded in the pre-determined needs of the offender and the victim in their respective roles. *See* ZEHR, *supra* note 8, at 37.

Restorative justice thus has at least two, related theoretical underpinnings.<sup>93</sup> The first is therapeutic in nature: it suggests that any process aimed at redressing an incident of harm should meet the emotional and physical needs of those harmed and those who caused the harm. The second underpinning advances informalist conflict resolution: it suggests that incidents of harm need not be prosecuted as crimes if the people involved are willing and able to resolve the conflict out of court. As a result of these related ideas, restorative justice programs usually bear the following hallmarks: a focus on harm rather than on violation of law, consideration of the interests and needs of both victim and offender, support for the offender to meet achievable obligations, and facilitation of dialogue that involves the community affected by the harm.<sup>94</sup>

1. *The two agendas of restorative justice in practice*

In practice, many restorative justice programs attempt to meet both a therapeutic and a dispute resolution agenda by offering face-to-face encounters between defendants and complaining witnesses or victims of crime.<sup>95</sup> These programs can be grouped into three main categories: victim-offender mediation, conferencing, and circles.<sup>96</sup> Victim-offender mediation is the most well-known and widespread restorative justice practice in the United States.<sup>97</sup>

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93. A third strand of restorative justice theory and practice involves the role of community involvement, which I do not explore in depth in this article. See Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. R. 343 (2003) (providing a comprehensive critique of the deployment of the term "community" by restorative justice theorists and practitioners).

94. See Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls,* 89 MARQ. L. REV. 251, 258 (2005).

95. A discussion of transitional justice as it has developed internationally in response to systemic harm or society-wide conflict is beyond the scope of this article. Efforts to bring justice and reconciliation in cases of widespread, systemic injustice include initiatives such as the Truth and Reconciliation Tribunals in South Africa and Timor-Leste, as well as in Canada (to address injustice against First Nation People) and in Greensboro, North Carolina (to address atrocities committed by the KKK). See generally, Elin Skaar, *Reconciliation in a Transitional Justice Perspective,* 1 TRANSITIONAL JUSTICE REV. 1 (2013) <http://dx.doi.org/10.5206/tjr.2012.1.1.4>

Within the scope of this article are restorative justice and conflict resolution processes that are used in other countries to resolve individual incidents of harm that would otherwise be handled by the juvenile or criminal justice system. Canada, England, Australia, New Zealand, Norway, and Japan employ restorative justice programs similar to the programs I describe in the United States. See Jeff Latimer, Craig Dowden & Danielle Muike, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis,* 85 THE PRISON JOURNAL 127, 128 (2005); Ida Hydle, *Youth Justice and Restorative Justice in Norway,* in RESTORATIVE JUSTICE TODAY 63 (Katherine S. and Wormer & Lorren Walker eds., 2013) (discussing family group conferencing for children accused of crimes in Norway).

96. Jeff Latimer, Craig Dowden & Danielle Muike, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis,* 85 THE PRISON JOURNAL 127, 128 (2005). I do not address "circles" in depth in this article.

97. As of 2001, there were 289 VOM programs in the United States, 65% run through private, non-profit, or religious organizations and 35% run through the executive branch (police, prosecutor, corrections department, etc.). See U.S. DEPARTMENT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, CENTER FOR RESTORATIVE JUSTICE AND PEACEMAKING, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS 13, 15 (2000). In 1994, the American Bar Association endorsed victim-offender mediation. *Id.* Although initially skeptical of the treatment victims might receive in mediation with the accused, the

In victim-offender mediation, a mediator facilitates a discussion between the defendant and complaining witness. It can be distinguished from mediation in the civil context in several ways, one of which is that victim-offender mediation assumes the underlying facts that led to criminal or juvenile charges are accurate and removes dispute about the facts from the mediation context. A crime occurred, the victim and offender have been identified, and the task of the victim-offender mediation is to reach an agreement that repairs the harm to the victim and holds the offender accountable.<sup>98</sup>

Restorative justice also includes various forms of “conferencing.”<sup>99</sup> Conferencing is like mediation in that a third-party neutral facilitates an encounter between the accused and the complaining witness. However, unlike victim-offender mediation, anyone else involved or affected by the crime, including family members and friends of both parties, may attend the conference.<sup>100</sup> Conferencing is most frequently practiced with juveniles and usually involves the families of the children accused of the crime.<sup>101</sup> It frames its object as transforming the conflict caused by the harm through a group process.<sup>102</sup>

Restorative justice programs may accept referrals at any point during the juvenile or criminal proceedings. Cases are sometimes referred pre-adjudication, usually in instances involving minor offenses or juvenile respondents.<sup>103</sup> In other

National Organization for Victim Assistance endorsed the general principals of restorative justice as consistent with the goals of the victim’s rights movement in 1995.

98. UMBREIT, *supra* note 86, at xxviii. Critics of victim-offender mediation have also argued that it is a product of the victim’s rights movement. See Brown, *supra* note 9, at 1255–57.

99. The term “conferencing” originated in the New Zealand practice of “family group conferencing,” and the subsequent Australian practice of community conferencing. Lode Walgrave, *The Need for Clarity About Restorative Justice Conferences*, in CONFERENCING AND RESTORATIVE JUSTICE: INTERNATIONAL PRACTICES AND PERSPECTIVES 33 (Estelle Zinsstag & Inge Vanfraechem eds., 2012).

100. Restorative justice “circles” also involve encounters between the accused and the complaining witness. For example, sentencing circles involve the participants who might attend a community conference, as well as the prosecutor and the sentencing judge, and are designed to fashion an appropriate sentencing plan that “addresses the concerns of all participants.” Kay Pranis, *Peacemaking Circles*, in A RESTORATIVE JUSTICE READER 117 (Gerry Johnstone ed., 2013).

101. A 2009-2010 survey conducted by the European Forum for Restorative Justice revealed that conferencing is practiced in at least 26 countries worldwide, 58% in European and 42% in other parts of the world. Estelle Zinsstag, *Conferencing, A Developing Practice of Restorative Justice*, in CONFERENCING AND RESTORATIVE JUSTICE: INTERNATIONAL PRACTICES AND PERSPECTIVES 16 (Estelle Zinsstag & Inge Vanfraechem eds., 2012). Although community conferencing is practiced within the United States, I have found no estimate of the number of programs or the volume of cases resolved through community conferencing.

102. See Elizabeth Beck & Joan Pennell, *Decentralization and Privatization: The Promise and Challenges of Restorative Justice in the United States*, in CONFERENCING AND RESTORATIVE JUSTICE: INTERNATIONAL PRACTICES AND PERSPECTIVES 136 (Estelle Zinsstag & Inge Vanfraechem eds., 2012).

103. UMBREIT, *supra* note 86, at 145. Restorative justice dispute resolution also may take place within school settings as an alternative to suspension, expulsion, or school police action. See Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline and the School to Prison Pipeline*, 41 J.L. & EDUC. 281 (2012) (providing an overview of the use of restorative justice in school discipline cases). The use of restorative justice dispute resolution may serve to reduce contact with the juvenile and criminal justice system, diverting cases that would otherwise take more students down the path that has been critiqued as the school to prison pipeline. See Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1497–99 (2009) (internal citation omitted) (discussing how school discipline was once handled in school and referring to schools as “‘direct feeders’ of youth

instances, the court may make the referral after adjudication of guilt or delinquency as part of sentencing, particularly in cases involving serious crimes or adult defendants.<sup>104</sup> Finally, the corrections or probation department can make the referral after sentencing.<sup>105</sup>

Programs that offer pre-adjudication dispute resolution may successfully wed the goals of providing an alternative to criminal court and therapeutic outcomes. To the extent that the alternative dispute resolution process is occurring *in addition to* adjudication, however, the program is failing to meet its goal of providing an *alternative to* court. Rather than removing the conflict from the state's ambit of criminal prosecution, a referral to conferencing or mediation later in the course of prosecution is merely adding on terms of probation.<sup>106</sup> Since the therapeutic goals of restorative justice are seen as distinct from the goals of the criminal justice system (to punish or rehabilitate), a preference for a particular point of referral is rarely discussed in the restorative justice literature. The result is that many restorative justice programs may widen and deepen the net of prosecution and increase the ambit of the criminal justice system, the very system that restorative justice seeks to critique.

Examples abound of restorative justice programs in which the therapeutic agenda has eclipsed the dispute resolution agenda.<sup>107</sup> "Restorative justice" is a phrase that often describes programs in prison or probation regimens that involve an encounter and discussion between the convicted offender and the victim. Restorative justice programs have expanded to include programs such as neighborhood accountability boards and victims panels that involve no discussion or contact whatsoever between the accused and the complaining witness or victim.<sup>108</sup> Many of the emerging programs aim at reforming and reintegrating the offender in society. In the service of rehabilitation, many of the programs are mandatory, rather than voluntary, and are imposed either by the court through probation or by the

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into juvenile and adult criminal courts"); Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L. J. 1009, 1013 (2009). See also The Editorial Board, *The School-to-Prison Pipeline*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html>.

104. UMBREIT *supra* note 86, at 145.

105. Latimer, Dowden & Muise, *supra* note 72, at 129.

106. Point of referral has also been raised by critics of restorative justice with varying recommendations. Jennifer Gerarda Brown, for example, suggests that concerns over the lack of procedural safeguards in victim-offender mediation are so severe that mediation should only occur *after* sentencing. This is an example of the purely therapeutic use of victim-offender mediation, but here it is argued by a scholar concerned about the constitutional issues raised by victim offender mediation. Brown, *supra* note 9, at 1302.

107. See Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process — Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65 (2011) (discussing the use of post-sentencing VOM for specifically therapeutic purposes).

108. Umbreit *et al.*, *supra* note 94, at 253. Kathleen J. Bergseth and Jeffrey A. Bouffard offer an example of such a program in their study of recidivism rates of young offenders in a rural, Midwestern county. *The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders*, 35 J. OF CRIM. JUSTICE 433, 434 (2007).

departments of correction.<sup>109</sup> The mandatory nature of the programs employs the criminal justice system to directly coerce compliance with the restorative justice agenda.<sup>110</sup>

Thus, when restorative justice comes to mean merely a therapeutic consequence for a criminal offender, the breadth of activities deemed as restorative justice becomes startling. Programs in which inmates pick up trash have been called “restorative justice.”<sup>111</sup> In other cases, the term “restorative justice” has simply replaced the term “restitution” in court-ordered restitution payments.<sup>112</sup> Programs in which artists engage ex-offenders in creating public murals have been called “restorative justice.”<sup>113</sup> These programs may provide valuable services upon release from incarceration,<sup>114</sup> or genuinely advance penal reform within the prison system,<sup>115</sup> but they do not offer an alternative to the criminal justice system, nor do they offer dispute resolution services at all.

To the charge that restorative justice has become unmoored from out-of-court dispute resolution, or that the term has become so widely applied as to become meaningless, restorative justice theorists might rejoin that it is a socio-ethical theory far broader and deeper than any dispute resolution model.<sup>116</sup> It is a response to undisputed harm with a clear offender and clear victim, and its agenda consists of repairing any harm that was done to the victim,<sup>117</sup> and facilitating a “sequence of moral emotions” in the offender that will lead to personal accountability and, thus, rehabilitation.<sup>118</sup> Restorative justice theorists who take this approach have argued that “coercive obligations” that do not involve dialogue between the victim and

109. See, e.g., Daniel Patrick Downen, *Restorative Justice: Transforming Corrections*, (Nov. 7, 2011) <http://www.corrections.com/news/article/29594-restorative-justice-transforming-corrections> (“community service sanctions” designed to increase offender “accountability” as part of restorative justice).

110. Walgrave, *supra* note 45, at 96.

111. See, e.g., *MD Corrections Secretary Gets National Award*, BALTIMORE SUN (Nov. 7, 2012), [http://articles.baltimoresun.com/2012-11-07/news/bal-md-corrections-secretary-gets-national-award-20121107\\_1\\_national-award-illegal-cell-phones-public-safety](http://articles.baltimoresun.com/2012-11-07/news/bal-md-corrections-secretary-gets-national-award-20121107_1_national-award-illegal-cell-phones-public-safety) (corrections secretary “pushed inmate work programs, called ‘restorative justice,’ that give inmates job skills and help the community, such as the recent clean up of the historic Mt. Auburn cemetery in South Baltimore”).

112. *Ohio v. Graham*, No. 14 CA 10, 2014 WL 6601959, at ¶ 22 (Ohio Ct. App. Nov. 19, 2014) (“The trial court also ordered the Appellant pay two hundred and fifty dollars in restorative justice to the victim.”).

113. *Restorative Justice*, CITY OF PHILADELPHIA MURAL ARTS PROGRAM, <http://muralarts.org/programs/restorative-justice> (last visited Jan. 15, 2014) (“Current inmates, prisoners, parolees and probationers, and juvenile delinquents are given the opportunity to learn new skills and make a positive contribution [through mural making].”).

114. Gordon Bazemore & Shadd Maruna, *Restorative Justice in the Reentry Context: Building New Theory and Expanding the Evidence Base*, 4 VICTIMS AND OFFENDERS 375, 379 (2009).

115. A theory of prison reform in Brazil, for example, has attempted to transform some notoriously inhumane prisons through the application of restorative principles. The inmates are called *recuperandos*, people who are recuperating, and are given access to extensive health, mental health, job training, and legal services within the institution and as part of their release. Lorenn Walker, Andrew Johnson & Katherine Van Wormer, *Brazil’s Restorative Prisons*, in RESTORATIVE JUSTICE TODAY 151 (2013).

116. See Walgrave, *supra* note 45.

117. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2331 (2013) (primary goal of restorative justice is reparation of harm).

118. Walgrave, *supra* note 45, at 123–128.

offender, such as “formal restitution or compensation, fines or working for the benefit of a victims’ fund, and community service” may all be called restorative justice.<sup>119</sup> Such an expansive view is predicated on giving up the goal of out-of-court dispute resolution in favor of incorporating a more humane response to crime into the already existing criminal justice system.<sup>120</sup>

2. *Measuring restorative justice dispute resolution against the goals of mediation*

Returning to consideration of restorative justice dispute resolution, one might ask whether it offers a process that is substantively different from the criminal justice system. By comparing the goals of victim-offender mediation to the goals of mediation that is typically offered in civil cases, one can see that many of the assumptions and goals of the criminal justice system remain intact in restorative justice dispute resolution, compromising its ability to function as a form of quasi-decriminalization.

Any discussion of mediation within the civil context should begin with a caveat that its practice varies widely from its goals. In civil litigation, mediation is often mandated as part of the settlement process, rather than offered as an alternative.<sup>121</sup> Mediation increasingly involves a court-appointed mediator who shuttles between the plaintiff’s attorney and the defendant’s attorney, pressuring the attorneys to arrive at a compromise that will settle the case.<sup>122</sup> In cases in which the litigants are *pro se*, a court-appointed mediator may pressure a party into signing an agreement that prudent counsel would dissuade his client from signing.<sup>123</sup> Agreements reached in mediations between lawyers may be no different or more creative than agreements that would be reached in a settlement conference over which a judge presides.<sup>124</sup> Critics have further raised concerns that mediation results in biased and unfair agreements because its informal and private nature augments prejudice and power differentials between the parties who might otherwise be protected by the public and rule-based decisions of a formal tribunal.<sup>125</sup> Moreover, some studies suggest that, in mediations concerning monetary damages, repairing the relationship between the disputants is the exception rather than the norm.<sup>126</sup>

119. *Id.* at 96.

120. Dancig-Rosenberg & Gal, *supra* note 117, at 2335–37 (arguing that restorative justice is compatible with punitive justice and advocating for its integration into the criminal justice system).

121. At this point, widespread institutionalization of mediation in civil cases has been achieved. Bobbi McAdoo & Nancy A. Welsh, *Look Before you Leap and Keep on Looking: The Institutionalizing of Court-Connected Mediation*, 5 NEV. L.J. 399, 400 (2004-2005).

122. Welsh *supra* note 76, at 793 (discussing procedural justice within the context of court-connected mediation).

123. See McAdoo & Welsh, *supra* note 121, at 414.

124. See Welsh, *supra* note 76, at 794.

125. See Delgado et al., *supra* note 14 (offering a comprehensive theoretical critique of informalism in the early alternative dispute resolution movement).

126. Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Student and it Implications*, 7 HARV. NEGOT. L. REV. 301, 331–33 (2002) (discussing rarity of repaired relationships and reconciliation in mediation agreements); McAdoo & Welsh, *supra* note 121, at 424–25 (explaining that parties view mediation favorably in terms of fairness and benefit, but do not often agree that the mediation repaired their relationships).

This section, then, looks at the express goals of mediation rather than its practice. The express goals of restorative justice are compared to the express goals of mediation.

Mediation sets as its goal the opportunity to negotiate an agreement that is acceptable to everyone involved in the dispute. Two hallmarks of mediation are (1) facilitation by a neutral and impartial mediator,<sup>127</sup> and (2) party self-determination.<sup>128</sup> Mediators are impartial when they facilitate even-handedly without favoring one party over the other; mediators are neutral when they facilitate without attempting to steer the parties toward a particular outcome.<sup>129</sup> The style of the mediator may vary, but the issues discussed and agreements made in mediation will be determined by the parties rather than by the neutral mediator.<sup>130</sup> Party self-determination means that the parties may decide what is relevant to their dispute and exercise autonomy in arriving at solutions tailored to their needs and interests rather than to legal norms.<sup>131</sup> Within this context, it is the job of the mediator to help the parties identify their underlying interests, understand one another's perspectives better, and assist the parties in developing a broad range of options for settlement.<sup>132</sup>

In the criminal context, restorative justice theorists claim that its processes can similarly restore autonomy in the form of "personal power" to both the accused and the person claiming injury.<sup>133</sup> One of the founding theorists of restorative justice, Howard Zehr, argues that, within the criminal court system, the victim is twice

127. Douglas N. Frenkel and James H. Stark discuss three "fundamental norms" of mediation, self-determination, impartiality, and neutrality. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 85–87 (2012). I discuss impartiality and neutrality together as one norm of mediation.

128. "Self-determination in this context means that parties retain control over both their participation in the process of dispute resolution and the outcome of their dispute." Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider & Jean R. Sternlight, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL*, 226 (Vicki Been et al. eds., 2nd ed. 2011). Mediators facilitate self-determination by providing a structure in which the parties to a dispute may speak, be heard, and negotiate agreements that are acceptable to them. *Id.* at 227.

129. FRENKEL & STARK *supra* note 127, at 86.

130. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations, Strategies and Techniques*]. Riskin created a taxonomy for mediator orientations that is widely used today, although he has since both modified and qualified his grid of mediator orientations. See, e.g., Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. R. 1, 30–34 (2003) [hereinafter Riskin, *Decisionmaking in Mediation*] (introducing a new taxonomy using the terms "directive" and "elicitive" to describe mediator orientation). The terms "facilitative" and "evaluative," however, remain a frequently used method of describing mediator orientations. A mediator who takes a facilitative orientation will assist parties in identifying and understanding the issues, developing options and negotiating an agreement, but will generally not propose solutions or predict what the outcome of litigation would be. In contrast, an evaluative mediator may predict the outcome of litigation by assessing the strengths and weaknesses of each party's case, and propose settlement terms. FRENKEL & STARK, *supra* note 128, at 77.

131. See MENKEL-MEADOW ET AL., *supra* note 13, at 226–27. The idea that disputes often lend themselves to mutually beneficial resolution is rooted in negotiation literature as the theory of "integrative bargaining." ROGER FISHER & WILLIAM URY, *GETTING TO YES* 58–81 (2011); FRENKEL & STARK, *supra* note 127, at 34–39.

132. See Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques*, *supra* note 130; Riskin, *Decisionmaking in Mediation*, *supra* note 130.

133. See ZEHR, *supra* note 8, at 52–55, 203.



disempowered: first by the crime and second by a criminal justice system that marginalizes his or her needs. Moreover, the offender may have committed the crime *because* of a blanket sense of powerlessness and is then disempowered again as the “pawn” in criminal prosecution.<sup>134</sup> In contrast, Zehr argues, restorative justice processes involving direct, face-to-face participation of the accused and the accuser would seem to ensure that both exercise more power and autonomy than they would in court.<sup>135</sup>

Yet despite the promise of empowerment, restorative justice theory severely curtails party self-determination in several ways, suggesting that it functions more as a method of informal prosecution than as a form of mediation. First, restorative justice does not permit the accused and complaining witness to determine the underlying facts and the meaning of the incident. The offender usually must admit guilt, and mediators are urged to prevent the participants in the mediation from arguing about the facts.<sup>136</sup> Whereas mediation generally allows the people involved to determine the meaning of the conflict,<sup>137</sup> in restorative justice programs, the underlying assumptions are sweeping.

The pre-determination of the facts and their significance compromises the restorative justice mediator’s neutrality and impartiality. The mediator in victim-offender mediation frames the issues to be discussed in a static and narrow way: the disputants are the “victim” and the “offender,” the offender has harmed the victim, and the resolution must provide “repair,” “accountability,” and “restoration.” Within the context of civil mediation, re-framing is designed as a technique to help disputants shift from inflexible positions to understanding the interests of both parties. To reframe, the mediator uses different words than the disputant uses, usually in a way that makes a disputant’s statement, topic, or offer more palatable to the other side by shifting the language to create a different “frame.”<sup>138</sup> The manner and degree to which a mediator re-frames the issues presented in mediation can have a substantial impact on negotiation and outcome.<sup>139</sup> Because reframing influences outcomes and impinges upon the way in which disputants might otherwise characterize the dispute and their demands, at least one method of mediation, transformative mediation, eschews the practice of reframing altogether.<sup>140</sup>

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134. *See id.* at 53–55.

135. *See generally id.* at 203–04 (discussing the importance of “direct interaction” between victims and offenders). In instances in which the victim or complaining witness in a particular case are unwilling to meet with the defendant, Zehr suggests that “surrogate victims” can be used as an effective substitute to facilitate direct interaction with the offender. *Id.* at 206.

136. UMBREIT, *supra* note 86, at 52.

137. Rubinson, *supra* note 77, at 86–87.

138. *See generally* WILLIAM URY, GETTING PAST NO 78 (1993) (describing the process of reframing in the context of negotiations).

139. Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement and Education*, 21 OHIO ST. J. ON DISP. RES. 123, 134 (2005).

140. *See* Joseph Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and in Practice*, 84 N.D. L. REV. 823, 846 (2008) (“Directing the parties toward particular outcomes or reframing issues runs counter to a key premise of the transformative framework, namely, that parties are the best authors of their own choices and decisions.”). *See also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH

The mediator in victim-offender mediation creates a frame that steers and perhaps even predetermines the outcome. The players' roles are set as victim and offender, and the goal is to compensate the victim and ensure offender accountability.<sup>141</sup> The coercive effect of the threat of prosecution puts an additional thumb on the scale towards the pre-determined outcome. Thus, negotiation may focus exclusively on the complaining witness or victim's requests for compensation.<sup>142</sup> The extent of the accused's bargaining power may be simply to say "no," and return to court to be prosecuted. Moreover, the intended restorative justice benefit is defined exclusively in terms of healing, accountability for actions, and the opportunity to repair harm, not in terms of leniency for the defendant.<sup>143</sup>

Restorative justice theory goes farther by presuming that the accused acted out of a lack of appreciation for others and a shirking of responsibility for his actions.<sup>144</sup> Restorative justice theorist John Braithwaite even asserts that the *interior* experience of the parties in victim-offender mediation should follow a particular sequence predetermined by a desired outcome. He posits that the offender should be taken through a process of "reintegrative shaming," in which "expressions of community disapproval" are followed by "gestures of reacceptance into the community."<sup>145</sup>

While many restorative justice proponents do not embrace the idea of reintegrative shaming, it echoes in restorative justice literature in milder forms,<sup>146</sup>

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TO CONFLICT (2005) (providing a comprehensive overview of transformative mediation written by its founders).

141. Restorative justice defines "accountability" as "taking ownership of wrong doing." ZEHR, *supra* note 8, at 73.

142. Zehr has questioned whether victim-offender mediation should be called mediation given that the victim should not be required to compromise or accommodate the offender. Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401, 405–06 (2005).

143. See UMBREIT, *supra* note 86, at 47 ("The purpose of the mediation session is for the victim and offender to have the opportunity to learn from each other . . . to get a greater sense of closure, and to develop a mutually acceptable plan.") Moreover, as discussed *infra* note 243, if the defendant has not consulted with a defense attorney, and the complaining witness has not spoken with the prosecutor about the likely outcome of the case at trial, the quality of their negotiations may be distorted by unrealistic or erroneous ideas about what is likely to happen if the mediation is not successful. See, e.g., Brown, *supra* note 9, at 1266 (discussing the potential for exploiting parties' "uncertainty" and "ignorance" about "what will happen in the criminal justice system").

144. See Delgado, *supra* note 9, at 764–65 (in VOM, "offender is treated as a thing to be managed, shamed, and conditioned").

145. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 55 (1989). The relationship between the state and the community is not entirely clear in Braithwaite's formulation, although he suggests that "state shaming can trigger much of the community shaming." *Id.* at 97. It is thus not clear how the perception of the state as an unjust outside entity shaming an individual might unfold in Braithwaite's theory. See, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (discussing state-imposed shaming punishments).

146. See Walgrave, *supra* note 45, 123–28 (discussing the "sequence of moral emotions" in restorative justice, which begin with the defendant's embarrassment and often the victim's desire for punishment or revenge and, ideally, wend their way to apology and forgiveness. Walgrave does not, however, set the sequence of moral emotions as the express goal of restorative justice, only as a benefit and characteristic of the process).

and appears to have its genesis in a larger theme in Western thought regarding wrongs and the possibility of redemption through confession, apology, and amends.<sup>147</sup> By deliberately steering the discussion toward apology and forgiveness in order to arrive at the prescribed reconciliation, the mediator compromises his or her impartiality and neutrality.<sup>148</sup>

The lack of neutrality in language and process may benefit a victim of a violent crime who was traumatized by the incident and fears a hostile conversation with the defendant facilitated by an unsympathetic mediator.<sup>149</sup> Indeed, many victims of violent crime might be unwilling to meet with the defendant absent some assurance that the defendant intends to take responsibility for the crime, with an eye toward repairing any harm that he or she caused.<sup>150</sup> But crime is not monolithic and individual reasons for violations of criminal laws vary widely; it is not always a question of victimization and offender accountability.<sup>151</sup> Consider one of the examples offered *supra* Section I, involving a divorcing couple engaging in reciprocal violence for which only one is arrested and charged. The mutually exclusive roles of the victim and offender in restorative justice are not designed to accommodate these ambiguities.

Even if we assume a crime occurred, and the defendant admits guilt, we still do not know what motivated his or her actions and therefore what might deter him or her from committing the same crime again in the future. To model a dispute resolution process on the assumption that criminal defendants are shirkers of responsibility who need reform is to predetermine too much. Participants' limited autonomy and the predetermination of issues makes restorative justice inappropriate for disputes in which the nature of and motivation for the crime is at odds with the narrative. Participants in restorative justice proceedings who do not fit into its narrative must either opt out of the process or try to fit their needs and interests into this narrow framework.

Of course, restorative justice in practice may look different than restorative justice in theory, just as the practice of mediation in the civil context varies widely from its theory. A restorative justice program may offer more neutrality in practice than its theoretical underpinnings suggest by accommodating ambiguity and embracing greater neutrality. In so doing, the program diverges from the doctrine of

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147. ZEHR, *supra* note 8, at 51 (“Both victim and offender need to be healed . . . and this healing requires opportunities for forgiveness, confession, repentance, and reconciliation.”); *Id.* at 126–57 (discussing the biblical roots of confession, repentance and forgiveness in relation to restorative justice, which is referred to as “covenant justice” in the Old and New Testaments).

148. ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 82 (2004) (criticizing the push in restorative justice for the defendant to apologize and the complaining witness to forgive as resulting in a “collusion of sentimental scripts”).

149. *See, e.g.*, Umbreit et al., *supra* note 94, at 298–99 (criticizing restorative justice initiatives that do not take into account the victim’s experience and needs as leading to “re-victimization”).

150. UMBREIT, *supra* note 86, at xxviii (restorative justice “recognizes crime as first and foremost an activity directed against individuals” and centers its interventions around the needs of the victims of crime).

151. MICHAEL M. O’HEAR, *RESTORATIVE JUSTICE: DANGERS OF THE BIG TENT, CRIMINAL LAW CONVERSATIONS* (Paul H. Robinson et al. eds., 2009) (noting that restorative justice presumes the crime and that the defendant is a moral agent responsible for the crime, leaving no room for factual disputes or nuanced understanding of the causes of crime).

restorative justice. Yet, to the extent that many restorative justice programs embrace predetermined roles and prescriptive outcomes, restorative justice offers less party self-determination and a narrower range of potential outcomes than neutral mediation. Moreover, the restorative justice mediator cannot be said to be neutral or impartial if he or she employs a pre-determined framework with prescribed outcomes. The “restorative” or therapeutic agenda appears to eclipse the dispute resolution potential of restorative justice and make it inappropriate as a broadly applicable alternative to criminal court.

### **B. Language Masking the Influence of the Criminal Justice System**

Beyond its tendency to slip into the role of a therapeutic adjunct to the criminal justice system, restorative justice poses the threat of masking the coerciveness and pervasiveness of the criminal justice system. It does so by employing a rhetoric that suggests that restorative justice is philosophically separate from the modern criminal justice system and rooted in better, ancient practices.<sup>152</sup> It purports to offer an alternative to the criminal justice system that embodies an entirely different paradigm.<sup>153</sup> The danger is that this polarizing rhetoric masks the influence of the criminal justice system over restorative justice practices, an influence that can result in coerced agreements and unjust outcomes, described earlier in Part I.

Proponents of restorative justice describe it as a paradigm shift<sup>154</sup> that offers “an entirely different way of understanding and responding to . . . conflict.”<sup>155</sup> Whereas criminal justice addresses a violation of law in which the victim is the state and guilt and punishment must be determined, restorative justice addresses the violation of relationships caused by an incident of harm, requiring that the person causing the harm take responsibility for meeting the needs of the person harmed.<sup>156</sup> Accompanying the view that criminal justice and restorative justice are distinct rivals is the idealization of restorative justice and the devaluation of criminal justice.<sup>157</sup>

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152. Susan Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 *LAW & SOC’Y REV.* 139, 142 (2004).

153. Other proponents of restorative justice have suggested that it should be integrated fully into the criminal justice system with the goal of supplanting punitive and rehabilitative sanctions with restorative sanctions, or, alternatively, implementing both punitive and restorative sanctions. See Lode Walgrave, *How Pure Can a Maximalist Approach to Restorative Justice Remain? Or Can a Purist Model of Restorative Justice Become Maximalist?* 3(4) *CONTEMP. JUST. REV.* 415, 417–18 (2000) (supplant punitive justice); Dancig-Rosenberg & Gal, *supra* note 117, at 2339–42 (integrate restorative with punitive justice).

154. ZHR, *supra* note 8, at 63–82.

155. Umbreit et al., *supra* note 94, at 300.

156. Umbreit et al., *supra* note 94, at 257.

157. NANCY MCWILLIAMS, *PSYCHOANALYTIC DIAGNOSIS: UNDERSTANDING STRUCTURE IN THE CLINICAL PROCESS* 105–06 (1994) (noting that in the psychoanalytic context, idealization and devaluation are viewed as defenses against intolerable fears or anxiety regarding our vulnerability); Kathleen Daly, *Restorative Justice: The Real Story*, 4 *PUNISHMENT & SOC’Y* 55 (2002) (arguing that the need to idealize either restorative or criminal justice and devalue the other may contain a desire to dispel ambiguities by imagining a bright line distinction between the two regimes, while at the very least using the idealized rhetoric to sell restorative justice to a skeptical criminal justice system).

Restorative justice advocates view the criminal court as a product of an external state rather than of the community.<sup>158</sup> To buttress this distinction between community-based and state justice, restorative justice theorists sometimes invoke an image of a more idyllic past in which humans had simpler, kinder and more humane ways of resolving interpersonal conflicts. The literature often harkens back to a time when families and communities resolved their own disputes without the aid or interference of the state.<sup>159</sup> The argument may start with reference to Anglo-American dispute resolution before the advent of crimes against the King's peace in the eleventh century, when there was no crime *qua* crime, but only interpersonal conflicts requiring repair and amends among the individuals involved.<sup>160</sup> Alternatively, the argument may start with reference to conflict resolution practices around the world such as Native American tribal councils, Maori *koreru*,<sup>161</sup> and Afghani *jirga*.<sup>162</sup> Descriptions of indigenous or ancient dispute resolution processes can seem romanticized – a wise community reconciles all parties without reference to Western law and procedure.<sup>163</sup>

The romantic notion that justice was done better in the past or in cultures untouched by western legal systems is then applied to the present day.<sup>164</sup> Communities today, we are told, can resolve crimes better than the criminal justice system. Restorative justice proponents thus embrace the idea of community as the entity that set norms for behavior, makes wise decisions regarding how to repair and incident of harm, and is capable of reabsorbing the offender into its midst after the

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158. The tendency to perceive a clear demarcation between criminal law and restorative justice is not exclusive to the proponents of restorative justice. Both restorative justice proponents and its critics have tended to present the discussion as a clear binary between formalism and informalism. Speaking of critiques of informalism, Roger Matthews writes, “a prominent feature among both the optimists and pessimists is the tendency to address the problem in terms of exclusive oppositions between formal/informal; conservative/liberating; legalization/delegalization, etc. Framing arguments in all or nothing terms makes for good polemics but bad politics.” ROGER MATTHEWS, *INFORMAL JUSTICE?* 1–24 (1988).

159. See Olson & Dzur, *supra* note 152, at 144–45 (providing a general review of the literature).

160. Umbreit et al., *supra* note 94, at 255.

161. See, e.g., Laverne F. Hill, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children*, 22 ALASKA L. REV. 89 (2005) (claiming that similarities between restorative justice processes and indigenous systems of justice are sometimes used as a justification for employing restorative justice practices instead of traditional criminal or juvenile justice practices in conflicts involving indigenous populations such as Native Americans and Native Alaskans).

162. Umbreit et al., *supra* note 94, at 255; see also Wardak Ali, *State and Non State Justice Systems in Afghanistan: The Need for Synergy*, 33 U. PA. J. INT'L L. 1145 (2011-2012) (providing a nuanced and thoughtful account of Afghani *jirga* and how it relates to state-run justice in Afghanistan).

163. See CHRISTIE, *supra* note 15, at 75–80 (illustrating informal community justice as women at the water well rendering “horizontal justice”); see also ZEHR, *supra* note 8, at 115 (discussing horizontal justice in terms of the ancient German notion of *frith* as compared to the vertical justice of the “kings peace”).

164. HOWARD ZEHR, *RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE* 5 (1985). It should be noted that this view of community justice may be distinct from the community justice movement that includes neighborhood watch and other orchestrated neighborhood responses to crime. See Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 CONTEMP. JUST. REV. 13 (2004) (discussing the distinction between the restorative justice movement and the community justice movement, and arguing to preserve the distinction).

harm has been repaired.<sup>165</sup> Little analysis is given to the definition of community, a term that is notoriously difficult to define and can serve as “a trope invoked as an unassailable value to be defended against corruption of all kinds.”<sup>166</sup> In this regard, we are cautioned to remember the reasons for our initial commitment to formal, rule-based systems of justice, the fear of mob rule.<sup>167</sup>

There is a certain seduction in the rhetoric of dismantling the criminal justice system and returning conflicts to communities for resolution. Restorative justice literature engages in the “skillful deployment”<sup>168</sup> of stories, ideals and myths in order to change the discourse surrounding crime and, thus, change how society responds to crime. In describing the supplanting of legal discourse with social work discourse within the context of child custody proceedings, Professor Martha Fineman notes the use of “narrative strategies” to create positive stories about the change in policy.<sup>169</sup> The rhetoric seems sweeping and implausibly optimistic because, “In order to become dominant, a discourse often must compete with other potentially dominant discourses – it must exert control over the concepts and ideas that are understood to be the foundation of the area.”<sup>170</sup>

One might agree that a change in discourse is necessary in order to envision how we might reduce reliance on punishment and prisons as the primary vehicles for enhancing public safety. Yet to frame restorative justice as the re-birth of ancient practices is to indulge in an origins myth, a narrative that is not tethered to fact but is instead designed to establish authenticity and worth. No doubt people resolve conflicts outside of court all of the time, including conflicts that have resulted in acts of violence. But the danger posed by restorative justice’s rhetoric of idealization and devaluation is that it works a distortion. This distortion inhibits an accurate and fair assessment of both the alternative presented by restorative justice and the rejected criminal justice paradigm. The potential for widening and deepening the net of the criminal justice system is obscured by the ideological rhetoric of restorative justice as separate from the criminal justice system.<sup>171</sup> Likewise, the coercive effect of the threat of prosecution may be masked during victim-offender mediation because the mediator insists that it is a voluntary process not governed by the norms of criminal court.

### 1. *Devaluation of due process*

Idealization of restorative justice as a complete alternative to the criminal justice system leads to undervaluing of the safeguards built into the criminal justice

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165. See, e.g., BRAITHWAITE, *supra* note 145, at 55.

166. Weisberg, *supra* note 93, at 374.

167. See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (discussing the development of modern criminal procedure as a response to mob-dominated trials of African Americans between the First and Second World Wars).

168. ACORN, *supra* note 148.

169. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 753–54 (1988).

170. *Id.* at 736.

171. See *supra* Section I.A. (noting that even referrals from schools or community organizations to restorative justice programs carry the threat of prosecution and its attendant coercion if the incident alleges a crime over which the state has jurisdiction).

system. Zehr and others complained that the procedures required by due process were cumbersome, and that an emphasis on procedure would thwart the goal of substantive justice.<sup>172</sup> As a result, the restorative justice literature has historically contained few serious constitutional discussions, preferring instead to present itself as an alternative to the criminal court system with entirely distinct procedures and objectives.<sup>173</sup>

With the acknowledgment that restorative justice programs, like victim-offender mediation, are often adjuncts to the criminal and juvenile justice systems, the question is squarely raised what constitutional concerns may be implicated.<sup>174</sup> Assuming that a restorative justice program receives state funding or that it accepts referrals from the state, it is likely a state actor for constitutional purposes and the question is not whether due process applies, but what process is due.<sup>175</sup>

Criminal cases are referred to restorative justice programs at a variety of different points in the criminal justice system. What due process concerns may be implicated is tied to the point of referral. If the referral occurs pre-adjudication, the defendant waives her right against self-incrimination as well as her rights to a trial by jury, to confrontation and to cross-examination of witnesses, to appeal in the event of a verdict of guilty, and to be represented by counsel.<sup>176</sup> If participation in the restorative justice program is voluntary, defendants will be seen as waiving due process rights in exchange for resolving their cases through a more favorable process.<sup>177</sup> But there appears to be no established procedure to ensure that the waiver is “knowing and voluntary,” such as the waiver that accompanies a guilty plea in the

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172. ZEHR, *supra* note 8, at 78 (critiquing due process as derived from ancient Roman law that “defined [justice] by the process more than by the outcome”).

173. Some movement founders have acknowledged that further attention to due process concerns is necessary, but have done little to advance the discussion. *See, e.g.*, Umbreit et al., *supra* note 94 at 304; HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 60 (2002).

174. Professor C. Quince Hopkins, for example, has explored legal considerations for defendants who participate in restorative justice programs designed specifically for sexual assault cases. *The Devil is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses in Sexual Assault Cases*, 50 CRIM. LAW BULL. 478 (2014). An early examination of the constitutional and procedural issues raised by restorative justice can be found in two articles by Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1 (2004) (addressing due process, state action, self-incrimination and the Sixth Amendment right to counsel), and *The Law and Restorative Justice, Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2005) (discussing due process concerns and the right against self-incrimination). Reimund also addressed confidentiality in restorative justice in her article, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401 (2005).

175. Reimund, *Is Restorative Justice on a Collision Course With the Constitution?*, *supra* note 174. Court-referred or court-annexed mediation, whether mandatory or voluntary, is an extension of public dispute resolution. Regardless of whether the mediation is provided by a private entity or person, the provision of dispute resolution services is state action under a *Lugar/Edmonson* analysis. *See also* Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956 (2000) (offering a model for analyzing the degree to which an ADR program is integrated into the court system and thus functions as part of a “unified system of public civil justice in which trial [and all other forms of ADR] operate toward[s] the single end of binding dispute resolution”).

176. Delgado, *supra* note 9, at 760.

177. Simmons, *supra* note 55, at 978 (suggesting that restorative justice mediation requires a knowing and voluntary waiver of rights comparable to the waiver required in the plea bargaining context).

plea bargaining context.<sup>178</sup> Moreover, if the restorative justice process takes place post-adjudication as part of sentencing, the defendant's liberty and property interests under the Fifth Amendment, via the Fourteenth Amendment, are implicated.<sup>179</sup>

Restorative justice has yet to offer a comprehensive answer to the procedural concerns addressed above, most likely because it erroneously posits itself as functioning outside of the criminal justice system.<sup>180</sup>

## 2. *Devaluation of professionalism*

In its rhetorical rejection of legal formalism restorative justice also rejects lawyers and other professionals who could address the process dangers associated with the criminal justice system.<sup>181</sup> Within the restorative justice literature, de-professionalization is derived from Christie's argument that conflict is property, and that the designation of a conflict as a crime is tantamount to the state taking the conflict and claiming it as its own. Christie has even referred to this as a theft by professionals of community conflicts.<sup>182</sup> Restorative justice theory suggests that the involvement of any professional carries a risk for the community because it may "shrink the space of democratic authority" by claiming "expertise and authority over tasks involved in achieving public purposes like criminal justice."<sup>183</sup>

It first bears mentioning that the notion that ordinary people should be the arbitrators of criminal matters has a long tradition in Anglo American law as evidenced in the very existence of the jury trial.<sup>184</sup> Empaneling a jury ensures that ordinary citizens, and not professionals, determine the meaning of actions and conflicts. As Chesterton wrote more than a century ago:

The trend of our epoch up to this time has been consistently towards specialism and professionalism . . . Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box.<sup>185</sup>

Unlike the criminal justice system, which clearly delineates the roles of professionals and non-professionals, restorative justice fails to acknowledge or define the substantial role that many professionals play in restorative justice work.<sup>186</sup>

Examination of existing restorative justice programs reveals substantial presence of professionals. Indeed, after several decades of development, restorative

178. *Id.*

179. Reimund, *Is Restorative Justice on a Collision Course With the Constitution?*, *supra* note 174, at 20.

180. *See generally* Reuben, *supra* note 175.

181. Olson & Dzur, *supra* note 65, at 59.

182. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3–5 (1977).

183. Olson & Dzur, *supra* note 152, at 148.

184. SADAKAT KADRI, *THE TRIAL: A HISTORY, FROM SOCRATES TO O.J. SIMPSON*, 103, 331 (2005).

185. G.K. CHESTERTON, *THE TWELVE MEN*, <http://fullonlinebooks.com/essays/the-twelve-men/ekjz.html> (last visited Oct. 20, 2015).

186. Olson & Dzur, *supra* note 152, at 145–46.



justice can be seen as a profession in itself, with restorative justice professionals making all of the structural, programmatic decisions and some of the content decisions. Job titles confirm that restorative justice is a professional skill set, such as “restorative justice planner.”<sup>187</sup> Ignoring the emergence of restorative justice professionals, while insisting that restorative justice is the practice of communities resolving their own conflicts, masks the significant role that professionals play in the outcomes.

Few of the professionals in restorative justice could be called “due process professionals;” that is, people whose professional identity and expertise is focused on protecting procedural due process rights, such as criminal defense attorneys, civil rights attorneys, and human rights advocates.<sup>188</sup> The absence of due process professionals has consequences for the integrity of the process. Restorative justice professionals cannot be expected to understand the process dangers for the defendant, but rather make choices based on the therapeutic goals of restorative justice, the “healing” potential of the encounter.<sup>189</sup> In so doing, restorative justice professionals may blind themselves to the coercion worked by the threat of prosecution and other pressures exerted by the criminal justice system. They may miss an issue of self-incrimination or the manner in which a defendant may feel forced to please the victim in order to avoid criminal sanctions. Moreover, the presence of crime control professionals – probation officers, corrections specialists and academic criminologists – raises concerns that even the therapeutic goals of restorative justice may be swallowed by the traditional crime control goals of deterrence through punishment.<sup>190</sup>

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187. Kay Pranis, *Reflections from a Descendant of the Minnesota Restitution Center (MRC)*, in *RESTORATIVE JUSTICE TODAY 15* (Katherine S. Van Wormer & Lorren Walker eds., 2013).

188. See Olson and Dzur, *supra* note 152, at 163 (exploring some exceptions to this general observation, such as a restorative justice program in Utah in which defense attorneys actively educate professionals engaged in the restorative justice project on the rights of defendants in criminal and juvenile cases). There appears to be growing awareness that, at least in the context of pre-adjudication diversionary restorative justice, due process concerns militate for defense attorneys acting in their traditional role. See Reimund, *supra* 174, at 18 (describing that there appears to be growing awareness that, at least in the context of pre-adjudication diversionary restorative justice, due process concerns militate for defense attorneys acting in their traditional role). See also Olson & Dzur, *supra* note 152, at 170–72 (pointing out that the values of restorative justice do not “trump” the values of traditional criminal justice and, as a consequence, legal professionals must play a role in restorative justice processes so that “the core legal value of fairness to offenders is not sacrificed”). Likewise, over twenty years ago, the American Bar Association (ABA) endorsed victim-offender mediation as an alternative to criminal prosecution with caveats that include the right to consult with an attorney “if represented by counsel.” *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, [www.vorp.com/articles/abaendorses.html](http://www.vorp.com/articles/abaendorses.html) (Aug. 1994). While the question of whether the Sixth Amendment right to appointed counsel for defendants who cannot afford an attorney was left open (and is a discussion for another day), the ABA envisioned a purpose for defense counsel in restorative justice proceedings just as in any other criminal matter.

189. ZEHR, *supra* note 8, at 51.

190. CHRISTIE, *supra* note 15, at 116 (“Criminologists have an extraordinary potential for being dangerous people. No wonder that Foucault was skeptical. Some of us work close to power and also close to the intentional delivery of pain.”).

### C. Conclusions on Restorative Justice

It is difficult to know what to do with restorative justice. On the one hand, empirical studies show a high rate of participant satisfaction with the process, as well as successful agreements.<sup>191</sup> It may also reduce recidivism and assist defendants in other, significant ways.<sup>192</sup> Yet it is impossible to square its rhetoric of offender accountability and victim healing with the goals of neutral dispute resolution. The therapeutic agenda limits its dispute resolution potential. As described above, restorative justice programs accept the legal narrative of crime, and the roles of the people involved as offenders and victims. They differ from the criminal justice system's characterization of events and consequences only in that they propose a therapeutic focus that may reroute the punishment phase away from retribution and toward rehabilitation and restitution. Moreover, restorative justice's self-proclaimed independence from the criminal justice system masks its role as part of a state system of crime control and punishment.

Restorative justice programs could ameliorate this problem by moving away from formulaic outcomes and toward a more neutral form of mediation that allows the participants to discuss the facts of the case, relative culpability, and a range of outcomes. Indeed, it is likely that some restorative justice programs already do this in order to accommodate the diverse range of cases referred by the police and the courts.<sup>193</sup> But, to move toward neutrality requires a compromise few proponents of restorative justice would favor; that is, the loss of the socio-ethical platform regarding the needs of victims and the accountability of offenders, and the foundational goals of the movement.

Perhaps the value of restorative justice is as a sentencing adjunct to the criminal justice system. There, it may serve to reframe responses to crime away from punishment and toward restorative outcomes. Such a role for restorative justice has been proposed in the juvenile justice context as well as in the adult criminal context.<sup>194</sup> In the search for a method of out-of-court dispute resolution that acts as a complete diversion from criminal court, however, restorative justice falls short.

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191. See *supra* Section I.C.; Latimer et al., *supra* note 96.

192. Studies comparing recidivism rates of defendants who participate in restorative justice produce varying and sometimes equivocal results. See Latimer et al., *supra* note 96, at 137 (providing results from a meta-analysis that found that modest reduction in recidivism was more pronounced for low-risk offenders). See also Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53(3) *Crime & Delinquency* 355, 371 (2007) (finding a slightly reduced recidivism rate for juveniles participating in a restorative justice probation project in Maricopa County, Arizona).

193. See *supra* Section II.A.2.

194. For a thoughtful analysis of the application of restorative justice to juvenile sentencing, see Samantha Buckingham, *Reducing Incarceration for Youthful Offenders With a Developmental Approach to Sentencing*, 46 *LOY. L.A. L. REV.* 801 (2013). See also Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 *MCGEORGE L. REV.* 787 (2006) (writing about the possibility of integrating restorative justice into federal sentencing procedure for adult defendants).

### III. MEDIATION WITH PROCEDURAL PROTECTIONS AS AN ALTERNATIVE

Ideally, an out-of-court dispute resolution process would avoid the pitfalls of restorative justice and instead offer a neutral process combined with procedural safeguards. Such a neutral process could serve as the presumptive track for criminal charges, with criminal prosecution operating as an alternative in instances in which (1) the complaining witness or the accused does not wish to resolve the dispute out of court, and (2) the state has a compelling reason to impose sanctions meeting the four goals of punishment, retribution, rehabilitation, incapacitation, and deterrence.

In current practice, the decision whether to prosecute violent crimes is weighted toward prosecution, with a minority of cases deemed eligible for diversion. To employ state prosecution as the primary method to resolve instances of violence is to employ what could be called a maximalist approach to crime. In contrast, we could employ a minimalist approach to violent crime.<sup>195</sup> We could begin with the default assumption that acts of violence usually can be resolved among the people involved without making the state a party, and that criminal charges need only be brought in exceptional circumstances when out-of-court dispute resolution fails and when the state has an interest in all four of the goals of punishment.<sup>196</sup> The presumption of a crime could be replaced with the presumption that most cases of injury or harm could be resolved without public prosecution.

It should be noted that precedent for employing neutral mediation in criminal cases exists. Community mediation programs, for example, often accept referrals from prosecutors for misdemeanor cases.<sup>197</sup> Unlike restorative justice programs, community mediation does not employ the victim-offender template or set a predetermined therapeutic goal.<sup>198</sup> But while community mediation can claim neutrality as to the merits of a referred case, it nonetheless is poorly suited for criminal mediation because fails to account for the procedural posture of the criminal case and, as a result, builds no procedural protections into its process, such as assuring access to and advice from counsel and oversight of agreements. The following section offers a brief sketch of a model for criminal mediation that

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195. I borrow “maximalism” and “minimalism” from CHRISTIE, *supra* note 15, at 85, who uses these terms in relation to the prison system.

196. See Tapia, *supra* note 19, at 2387.

197. Community mediation developed out of the neighborhood justice centers that emerged in the 1970’s where mediation and other forms of “informal justice” were developed and practiced. THE POSSIBILITY OF POPULAR JUSTICE 10–11 (Sally Engle Merry & Neal Milner eds., 1993) (discussing the history and development of popular justice in the United States within the context of introducing a collection of articles addressing the San Francisco Community Boards). Olson & Dzur, *supra* note 152, at 142 (noting that since their inception, community mediation programs have accepted referrals from police and prosecutors). See, e.g., *Statewide Evaluation of ADR in Maryland*, <http://www.marylandadrresearch.org/landscape/county/baltimore-city#TOC-District-Court-Criminal> (last visited Oct. 21, 2015) (discussing that the Community Mediation of Maryland organization provides mediation services for misdemeanor cases in numerous counties).

198. The New York based Peace Institute, for example, initially used victim-offender mediation for referrals for criminal cases. The Institute abandoned the victim-offender mediation model in favor of a community mediation model in which the designation of “victim” and “offender” are not used and in which the goal of the mediation is not pre-determined as the redress of harm. Interview with Carrie McCann, Director of Restorative Justice for the New York Peace Institute (June 12, 2014).

embodies neutrality, the best practices of civil mediation, and additional protections that take into account the posture of the criminal case.

#### A. Envisioning Early, Neutral Mediation

In an ideal system of criminal mediation, the state would assess cases before arraignment and determine which cases were suitable for diversion to mediation or conferencing.<sup>199</sup> Factors influencing suitability might include the nature of the dispute,<sup>200</sup> safety concerns, and the willingness of both the defendant and the complaining witness to participate. Participation would be voluntary and require the assent of both complaining witness and the accused. As is discussed *infra* Section III.B, the defendant would have the opportunity to consult with counsel regarding the choice whether to accept the diversion. Factors that might lead defense counsel to advise client to refuse diversion would include cases involving dispositive legal or factual issues that the defendant wishes to litigate, or an issue of precedential value that merits decision.<sup>201</sup> Likewise, the complaining witness may refuse mediation if she does not want to speak directly to the accused, or if she would like the tribunal to find guilt and impose punishment.

Participants in criminal mediation would include the mediator, defendant, defense counsel, complaining witness, and an advocate for the complaining witness, such as a private attorney or family member.<sup>202</sup> If the defendant or complaining witness requested the participation of other people who could provide additional information for or support in resolving the conflict, the mediator could conduct an initial screening and invite additional participants.

The goals of criminal mediation would be similar to the goals of mediation as it is practiced in the civil context,<sup>203</sup> specifically to provide a neutral and impartial mediator who can facilitate a discussion between the disputants in order to resolve the case. An agreement might be similar to an agreement in a restorative justice proceeding, such as an apology or a promise to pay restitution, but an agreement could look very different. The parties might simply agree that there had been a misunderstanding, or they might explore how the violence erupted and develop a plan to avoid further violent conflict in the future. Criminal mediation that did not

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199. I use conferencing as a general term for a mediation-type process that involves participants in addition to the accused and the complaining witness. If, for example, the incident occurred at a school, the school staff or other students might be involved in resolving the dispute.

200. For a perspective that some cases of serious violence require intensive services and interventions due to the profound impact of violence on the community, see James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 68 (2012). These cases may be better suited to other forms of intervention. See, e.g., DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2011) (describing initiatives designed to end cycles of urban violence).

201. See McAadoo & Welsh, *supra* note 121, at 412–13 (discussing cases inappropriate for civil mediation for similar reasons); see also *id.* at 425 (suggesting that courts should rule on any dispositive motion before mediation).

202. It would not be appropriate for a prosecutor to attend a quasi-private mediation between the defendant and complaining witness because the prosecutor does not represent the complaining witness, and because the prosecutor diverted the case from prosecution.

203. See *supra* Section II.A.2.

result in an agreement during the mediation session would result in the case returning to the pre-trial docket.

To comport with neutrality, the terms “victim” and “offender” would not be employed. Instead, parties to the out-of-court dispute resolution process would be referred to either in terms of participants in the process, or in terms of “defendants,” “juvenile respondents,” and “complainants.” Neutral mediation would not require an admission of guilt and would not proceed from the premise that the facts alleged in the police report are true, but would allow for an out-of-court negotiation of all aspects of the dispute or conflict that led to criminal charges. Factual disputes would play out in criminal mediation as they do in civil mediation; parties with contested factual and legal issues enter into mediation to resolve the dispute without necessarily agreeing to the underlying facts or liability. As such, the accountability of the defendant or juvenile respondent would not be a pre-determined goal of criminal mediation.

Of course, court-annexed mediation to resolve civil cases has received its share of well-deserved criticism.<sup>204</sup> In their analysis of the problems of court-annexed civil mediation, Professors McAdoo and Welsh suggest that substantive justice in court-annexed mediation could be enhanced by allowing litigants to opt out of mediation if they seek a decision on the merits, timely judicial ruling on dispositive motions, and external oversight of agreements to ensure that their terms are both fair and legal.<sup>205</sup> They further suggest monitoring and evaluating mediators to ensure that they are neutral, impartial and do not engage in coercive tactics, and that mediation participants can avail themselves of “easily accessible grievance procedures.”<sup>206</sup>

Yet despite adopting recommendations for best practices in civil mediation, criminal mediation faces additional problems attendant to criminal liability. If we acknowledge the effect of the criminal context on the negotiations, it follows that the mediation programs must be designed to minimize this effect as best they can. Defense attorneys have a role in monitoring the process and in ensuring that it proceeds with a clear understanding of how the case would unfold should it return to court. The goal is to protect against the dangers of informality while allowing willing parties to resolve incidents of interpersonal harm and conflict with minimal involvement of the criminal justice system.

## **B. Due Process Professionals in Criminal Mediation**

Defense counsel appointed in individual cases could ensure some of the protections necessary for criminal mediation. The presence of an attorney, however, would not suffice unless procedural protections were built into the structure of the mediation program and subject to some form of systematic oversight.

### *1. Systemic engagement*

Due process professionals, including defense attorneys, civil rights attorneys, human rights attorneys, and other advocates should participate in the

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204. See *supra* Section II.A.2.

205. McAdoo & Welsh, *supra* note 121, at 425–27.

206. *Id.* at 426–27.

design and monitoring of criminal mediation programs to ensure fairness. For example, through participation in program design and rule making, due process professionals can ensure that the decision to participate is made only after consulting with counsel and reviewing the likely outcome if the case proceeds in court; that the defendant will incur no penalty for failing to resolve the issue in mediation; that an admission of guilt is not required; that statements made in mediation cannot be used in a subsequent criminal prosecution; that a meaningful adversarial role for defense attorneys is built into the mediation process; and that the conduct of mediators or other dispute resolution facilitators can be monitored successfully.

Due process professionals can participate in designing and monitoring diversionary programs to ensure that they are meeting the goal of reducing overall contact with the criminal justice system. As discussed earlier,<sup>207</sup> programs designed to divert may widen the net of the criminal justice system.<sup>208</sup> Instead of dismissing a case that appears to be not particularly serious or meritorious, the prosecution may choose to keep the case alive through a diversionary program. Minor offenses may be prosecuted in order to leverage a conflict resolution process that would assist in order maintenance or promote therapeutic outcomes.<sup>209</sup> Once the defendant is engaged in the diversionary program, he or she is likely encountering therapeutic and crime control professionals who are unused to evaluating interventions to determine if they are net-widening or net-deepening.<sup>210</sup> Defense attorneys and other due process professionals, on the other hand, are uniquely suited to monitor whether diversionary programs widen and deepen the net.

It may be asked whether the appointment of counsel to represent individual defendants in mediation would suffice.<sup>211</sup> As in the case of problem solving courts, however, seemingly collaborative processes can mask an undercurrent of adversity that can be difficult for the defense attorney to effectively address.<sup>212</sup> The reason why defenders have a difficult time in criminal specialty courts is because there is no role built in to the system that allows them to zealously guard their clients' rights and

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207. See *supra* Section I.B.2.

208. See Delgado, *supra* note 9, at 761–62.

209. See McLeod, *supra* note 66, at 1594–95 (stating that models for some criminal problem solving courts include order maintenance and therapeutic jurisprudence).

210. Olson & Dzur, *supra* note 65, at 62 (stating that professionals with specific roles in the diversionary programs are not responsible for program outcomes).

211. See Delgado et al., *supra* note 14, at 1403 (suggesting that the appointment of counsel could mitigate against process dangers for defendants in victim-offender mediation, by stating that “[a]ny party desiring one should be provided with an advocate, ideally an attorney, experienced with representation before the forum in question”).

212. See Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 123 (2007) (discussing that defenders representing clients in drug court are encouraged to violate confidentiality and advance the court's treatment goals for defendant at the expense of pursuing client-centered goals). *But see* Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1351–53 (2011) (supporting the treatment team model of criminal defense within criminal specialty courts by arguing that, after advising a client to accept diversion to drug court, defense counsel's role changes to that of a team player on the drug court treatment team).

protect their clients from adverse decisions.<sup>213</sup> The program may fail to acknowledge that the defendant remains under the threat of criminal sanctions, including incarceration and, as a result, resist the defender's efforts to protect her client.<sup>214</sup>

Defense attorneys in criminal specialty courts, for example, may be encouraged to violate confidentiality in order to share important information with the treatment team, and to place the goals set by the treatment team before the goals of the client.<sup>215</sup> Even if the defense attorney assumes a collaborative stance with the other professionals in the court, at the moment when the defendant fails to comply with treatment and the judge threatens jail time, the defense attorney may realize that she is no longer a member of the treatment team, but back in her traditional role of standing between the client and the client's loss of liberty.<sup>216</sup>

As with problem solving courts, defense attorneys in mediation may find that the mediator discourages or rejects defense attorneys' efforts to defend the rights of clients as inappropriate for the informal venue. Mediation is designed to be informal and focused on the needs and interests of the disputants rather than on legal rights safeguarded through defined procedures and substantive law.<sup>217</sup> Mediators may discourage the participation of lawyers who introduce legal norms and rights discourse into the mediation.<sup>218</sup> Similar to the civil context, *pro se* defendants diverted to criminal mediation may find themselves making agreements in mediation without an accurate understanding of their legal rights.<sup>219</sup> Unless programs are designed to include appointment and representation by a defense attorney, defense attorneys may find no clear avenue to advise clients choosing whether to participate in criminal mediation, or to advocate for clients who are engaged in the negotiation process.<sup>220</sup>

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213. See Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1618–20 (2003) (pointing out that defenders are rarely part of the creation of drug courts, both in terms of design and institutional funding); see also Spinak, *supra* note 60, at 267 (exploring the limits on potential "team" created by defenders' exclusion from the administrative and financial control of specialty courts).

214. Meekins, *supra* note 212, at 89–91.

215. *Id.* at 92–93.

216. See Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 67–72 (2001) (arguing that defense counsel should not be required to give up protecting clients' liberty interests).

217. See Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1371 (1998) (stating that as an extension of negotiation, mediation facilitates agreements guided by the disputants' interests rather than by legal norms or rules); see also Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) (observing that mediation has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another").

218. See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L. J. 935, 948 (2001) ("Instead of viewing the participants across the mediation table as 'joint venturers' in a problem solving process, lawyers considered them adversaries. Hence, the contentiousness of the adversary system permeated the mediation process.").

219. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CINCINNATI L. REV. 891, 906–07 (2010).

220. See Spinak, *supra* note 213. See also Spinak, *supra* note 60, at 267.

While the presence of due process professionals at the design, implementation and monitoring stages of a criminal mediation program might not always be welcome, it would provide the necessary counter-balance to the crime-control and therapeutic interests that dominate diversionary programs. It would also ensure that questions of due process and the rights of the accused are not dropped from the discussion. As Professor Delgado wrote in his article critiquing victim-offender mediation, “The long-term strategy would focus on forcing dialog and competition between the two systems, drawing comparisons between them, making criticism overt, and attempting to engraft the best features of each onto the other.”<sup>221</sup>

## 2. *Individual representation of clients in mediation*

The question of whether it is beneficial to have legal counsel during mediation sessions has been debated extensively within the context of civil mediation.<sup>222</sup> To some extent, the debate has mirrored the debate over whether mediation is part of the legal-adversarial court system or, rather, functions as an independent process not subject to the same dangers as litigation and therefore not requiring the same procedural safeguards.<sup>223</sup> One argument made against attorney participation in mediation is that the lack of reference to substantive law and legal procedure within the mediation context renders meaningless the professional expertise of attorneys.<sup>224</sup> The next step of this argument is the claim that attorneys

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221. Delgado, *supra* note 9, at 774.

222. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 406–408 (2009). *See also*, Stephan Landsman, *Nothing for Something? Denying Access to Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 292–97 (2010) (discussing the risks to unrepresented parties in court-ordered mediation and benefits of legal counsel and advice during the negotiation process); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 452–56 (2010) (discussing research that contradicts assumption that lawyers make mediation more contentious); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 903–04 (2008) (discussing lawyers’ tendency to view the issues through a narrow lens of legalism thereby reducing the potential for integrative solutions in mediation); Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 114–117 (2005) (discussing tendency of lawyers to undermine the efficacy of mediation by viewing negotiation as an adversarial competition); Craig A. Mcewen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1364–73 (1995) (arguing based on a study of divorce mediation in Maine that lawyers do not act as “spoilers” in mediation); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FA. L.Q. 177, 177–88 (1994) (recounting story of divorce lawyer who failed to protect client’s interests in the mediation setting); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (discussing lawyers’ “standard philosophical map” as incompatible with goals of mediation)

223. Reuben, *supra* note 175, at 954–58 (describing the dominant “bipolar” view of litigation and alternative dispute resolution, while suggesting it might be more accurate to conceive of a unitary public justice system with various forms of dispute resolution operating closer to or farther away from the effects of government coercion).

224. Sternlight, *supra* note 222, at 393–99 (concluding the Supreme Court is most likely to find a right to counsel in instances in which legal skill and expertise are needed, the client lacks such expertise, and the proceeding is formal and adversarial; and that the Supreme Court is concerned that the presence of counsel in non-adversarial proceedings might distort the informality of the process).



may hinder the mediation by injecting legal norms that derail the parties' ability to reach an agreement that addresses their needs and interests.<sup>225</sup>

There are three persuasive rejoinders to the argument that attorneys are either useless in or a hindrance to mediation. First, there is growing acknowledgment that attorneys in mediation can protect the rights of the parties, a role the mediator cannot ethically fulfill.<sup>226</sup> Lawyers equip mediation participants with accurate information regarding the likely proceedings and range of outcomes in court, which ultimately increases party autonomy.

Second, lawyers offer clients more than technical assistance in matters of substantive and procedural law; they function as counselors, advisors, and problem-solvers and can help clients clarify their needs and goals, as well as provide emotional support during the mediation process.<sup>227</sup> In providing client-centered<sup>228</sup> and holistic<sup>229</sup> lawyering in criminal cases, defense counsel assists the client not only in avoiding negative legal outcomes, but also in negotiating an agreement that meets the client's broader needs or interests.

Third, it may be that the *lack* of clear legal procedure or reference to legal norms increases the need for legal representation.<sup>230</sup> In his article examining constitutional issues in alternative dispute resolution, Professor Richard Reuben notes that "mediation is a fluid process in which the absence of other procedural protections, the inherent problem of power imbalances, and the possibility that information disclosed can be used to a party's detriment outside the mediation all compel the recognition of the right to retained counsel."<sup>231</sup> The skill and abilities of mediators vary widely and a bad mediator can do great harm.<sup>232</sup> A mediator can exacerbate a power imbalance between parties, unconsciously or consciously take sides, or play on the fears of the participants regarding what will happen if they fail to resolve the dispute in mediation.<sup>233</sup> This concern is worsened within the context of criminal mediation because the power imbalance is unavoidable for any defendant

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225. See Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001); see also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982) (stating the classic form of this argument); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (discussing the ways in which legal norms and settlement expectations narrow the definition of issues and solutions in court-connected mediation).

226. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 345–47 (1999) (discussing lawyer's role in protecting a client during mediation).

227. Sternlight, *supra* note 222, at 406–08.

228. See Cait Clarke & James Neuhard, "From Day One:" *Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 14 (2004).

229. See generally, Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URBAN L. J. 1067 (2004).

230. Sternlight, *supra* note 223, at 412 ("[P]erhaps the need for representation is greater in certain informal settings than it is in more formal adversarial contexts.").

231. Reuben, *supra* note 175, at 1098–99.

232. Murphy, *supra* note 220, at 906–908.

233. Reuben, *supra* note 176, at 1093–94.

attempting to negotiate a resolution to his case.<sup>234</sup> Only the defendant risks conviction and sanctions.

Attorneys representing clients in mediation can play a significant role in monitoring the neutrality and impartiality of the mediator and the overall fairness of the process. Defense counsel in criminal mediations can monitor the process for fairness,<sup>235</sup> address confidentiality concerns,<sup>236</sup> and assist the defendant in negotiations.<sup>237</sup>

Even under the ideal circumstance involving a neutral mediator and a fair process, mediation can act as its own form of coercion by setting an expectation that the parties reach an agreement that resolves the case.<sup>238</sup> The strongest safeguard against this form of subtle coercion is the ability of any participant to terminate the mediation and return to litigation.<sup>239</sup> The presence of counsel can serve as a check and a reminder that other avenues remain open to the defendant and assist the defendant in evaluating whether to continue the process or to return to court.

Within the context of criminal mediation, defense counsel would also play a crucial role at the threshold, that is, the decision whether to mediate or continue to litigate the case in court.<sup>240</sup> A defendant faced with the option of criminal mediation must assess the option, as well as any proposed agreement, in light of what is likely to happen were he to opt instead to litigate the case. It is axiomatic to mediation and negotiation literature to state that fair negotiation is premised on knowing the Best Alternative to Negotiated Agreement, a concept known by its acronym, BATNA.<sup>241</sup> Without knowing the range of potential outcomes at trial, the defendant lacks the means to evaluate the desirability and fairness of participating in mediation and of any proposed agreement with the complaining witness.

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234. Delgado, *supra* note 9, at 760 (discussing victim-offender mediation where the defendant is in “an almost powerless position” to “cooperate or go to jail”).

235. *Cf.* Feeley, *supra* note 57, at 189–91 (discussing how fairness in the criminal court system usually means no more than that similar defendants get the same sentences for the same types of cases); John Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974) (discussing how procedural justice, a term coined in this article for the subjective experience of fairness, takes into account the needs and interests of the disputants as well as other extra-legal variables that the disputants consider relevant); Welsh, *supra* note 76, at 817 (describing the indicia of subjectively experienced fairness in the context of civil court-annexed mediation as (1) the opportunity to tell one’s own story; (2) the presence of a third party to consider the story; and (3) treatment by the third party in “an even-handed and dignified manner”).

236. Laflin, *supra* note 63, at 944 (discussing how confidentiality breaches could result in criminal liability because confidentiality protections in mediation are often inconsistent and uncertain). Moreover, exculpatory or inculpatory information may be revealed in mediation and the mediator is in no position to evaluate its significance to litigation.

237. It may be asked whether the complaining witness in a criminal mediation would have the benefit of counsel. The prosecutor, representing the state, is not counsel for the complaining witness, and therefore should not serve that function in the mediation. The complaining witness may have a private attorney or a victim advocate to assist during the mediation.

238. Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 268 (2014) (“Another possible result is that the unfamiliar party will assume that settlement is not optional (despite the mediator’s protestations to the contrary) and thus agree to a bad deal.”).

239. Reuben, *supra* note 175, at 1093, 1096.

240. *Cf.* Sternlight, *supra* note 222, at 405.

241. *See generally* Fisher & Ury, *supra* note 131, at 99–108.

In this regard, the role of defense counsel in advising his or her client to accept the diversion to criminal mediation mirrors the role of defense counsel in advising the client whether to accept a plea offer or proceed to trial.<sup>242</sup> Plea-bargaining represents a pervasive form of alternative dispute resolution (ADR) in criminal cases. The Supreme Court has set the lower limits of what is required for effective assistance of counsel during the plea negotiations to ensure that the defendant's waiver of rights is knowing and voluntary.<sup>243</sup> The impact of this line of cases may be in the acknowledgement that defense counsel must explore, analyze, and discuss with her client any information that could "change the nature of the negotiation."<sup>244</sup>

Finally, an essential role of defenders is, as always, providing a robust and meaningful litigation option. If the defendant expects poor representation and unfairness in criminal court, her decision to participate in mediation will be distorted by this fact, and the negotiation itself will be skewed by not just the coercive threat of prosecution, but the concern that, in that prosecution, the defendant will be treated unfairly and will not receive adequate representation.<sup>245</sup>

#### IV. POSSIBLE OBJECTIONS

##### A. Critiques of Informality in Dispute Resolution

A fundamental challenge to the benefits of reducing contact with the criminal justice system comes from the critics of informal negotiated settlement in its myriad of forms. The question turns in part on how we view negotiation. Is it "the expansion of options" or is it the unsavory practice of "back-room deal making"?<sup>246</sup> The ADR movement owes its momentum to the former view, the view that many disputes once viewed as a contest of rights may be suitable for negotiated

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242. Cf. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 98–107 (1995) (listing the tasks that a defense attorney must complete in order to be prepared to negotiate during plea bargaining, including, *inter alia*, investigating the case, obtaining complete discovery of potentially exculpatory evidence, and discussing the options thoroughly with the client, including apprising the client of the range of outcomes or trial and the collateral consequences of a conviction).

243. See *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)) (reiterating that defense counsel must adequately advise the client as to the terms of the sentence); *Padilla v. Kentucky*, 599 U.S. 356, 357 (2010) (holding defense counsel must also adequately advise the client of the collateral consequences of the conviction and counsel was deficient in failing to advise defendant about immigration consequences of guilty plea); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (holding defense counsel must communicate any formal plea offer to his client before the offer expires); *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (holding, in a companion case to *Frye*, that defense counsel may also be found deficient in instances in which the defendant rejects a plea offer based on counsel's erroneous assessment of defendant's chances of prevailing at trial).

244. Wesley MacNeil Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633, 636 (2013); see also Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L. J. 2650, 2650 (2013) (discussing defense counsel's obligation to negotiate effectively within the plea bargaining context in light of both recent case law and professional standards).

245. Cf. Murphy, *supra* note 220.

246. Peter S. Adler, *The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement*, in *THE POSSIBILITY OF POPULAR JUSTICE* 67, 69 (Sally Engle Merry & Neal Milner eds., 1993).

resolution.<sup>247</sup> Proponents of the latter view have suggested that the ADR movement itself was “more or less consciously designed to siphon discontent from the courts” during a time when underrepresented and marginalized groups were using the courts to assert their legal rights and create larger social change.<sup>248</sup>

Consider the plea bargaining system.<sup>249</sup> It is indisputable that criminal justice system is one of plea-bargaining rather than of evidentiary trials. In this sense, it can be said that somewhere in the range of 95% of criminal cases are resolved through ADR.<sup>250</sup> In each of those cases, some rights have been waived. Moreover, it degrades the adversarial system’s check on state action—illegal searches and seizures, interrogations that violate the defendant’s right against self-incrimination, crime labs that fail to adequately analyze evidence or falsify test results, witnesses for the prosecution including police officers and career informants who are never cross examined so as to challenge their false testimony.<sup>251</sup> These prevalent issues involving police and prosecutorial practices necessitate a continued role for a robust adversarial system.

Mediation, like plea-bargaining, is limited in its ability to address systemic problems and advance social justice because its procedures are solitary and private.<sup>252</sup> It occurs in a confidential setting among only the people directly involved in the incident, and, thus, it may function to “frustrat[e] collective responses.”<sup>253</sup> It should be noted, however, that the formal criminal trial is also atomized and designed only to resolve the individual case, thwarting efforts to address broader issues of social injustice. A litigated case may set precedent, but many issues that have systemic import cannot be addressed comprehensively through the litigation of

247. *Id.* at 69–70.

248. Delgado et al., *supra* note 14, at 1394 (citing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 144 (1983)).

249. See generally Owen M. Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1075 (1983–84) (making a direct parallel between civil settlement and plea bargaining in his seminal article critiquing settlement as an unworthy objective for civil litigation when he states, “[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment render subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done”).

250. *Missouri v. Frye*, 132 S. Ct 1399, 1407 (2012) (noting that ninety-seven percent of federal and ninety-four percent of state criminal cases resolve through a plea of guilty rather than through trial and that, “[i]n today’s criminal justice system . . . negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant”).

251. See generally Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931 (1983) (providing a thorough critique of plea bargaining as a corrosive force in the adversarial criminal justice system); Michelle Alexander, Editorial, *Go to Trial: Crash the Justice System*, *N.Y. TIMES*, Mar. 10, 2012, at SR 5 (suggesting that the system of mass incarceration would not be possible without the plea bargaining system, which permits a high volume of criminal sentences to be meted out every day). Defense attorneys trying less serious misdemeanor cases can have the positive effect of forcing the prosecution to reform or improve its practices. See, e.g., Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089, 1102–105 (2013) (recounting how not guilty verdicts in trials of misdemeanor trespassing cases in the Bronx led the Bronx District Attorney to adopt practices leading to fewer trespassing arrests and prosecutions).

252. See Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 *OHIO. ST. J. ON DISP. RESOL.* 1, 4–6 (2012).

253. Richard L. Abel, *Introduction*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 1, 7 (Richard L. Abel ed., 1982).

individual criminal cases. For example, discriminatory policing cannot be addressed effectively through the process of a criminal trial;<sup>254</sup> rather, it usually requires a civil suit directly challenging the discriminatory practices.<sup>255</sup> We are left, then, with the conclusion that neither the individualized trial nor mediation adequately addresses systemic inequality and injustice within the criminal justice system.

The formal criminal trial may protect against overt expressions of bias in some instances,<sup>256</sup> but it may also reflect the manner in which the state intrudes into ever widening spheres of social life, thereby exercising increasing social control and, with it, social injustice.<sup>257</sup> And it cannot, given the current rates of incarceration, be argued that the formality of the criminal courts has protected the rights of minority or marginalized groups from the over-reaching of the criminal justice system.<sup>258</sup> Indeed, severe racial disparity exists at all levels of the criminal and juvenile justice systems, culminating in what has been described as a system of race-based mass incarceration.<sup>259</sup> While over-valuing formalism's protections, critics of informality may be undervaluing its potential to allow disputants to resolve conflicts autonomously through the exercise of self-determination.<sup>260</sup>

In some individual instances an adversarial trial is the best option, such as in the case of mistaken identification. The identification procedures or forensic evidence can be challenged, witnesses cross-examined and the jury charged with evaluating the evidence in light of the rigorous standard of proof beyond a reasonable doubt. And there are surely instances in which a person has been the victim of a crime and has no interest whatsoever in meeting with the defendant, and the state has every interest in pursuing punishment. There are circumstances, however, where an informal resolution may be both more attractive to both parties and appear more suitable to the facts of the case.

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254. See *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that the defendant cannot challenge search and seizure on grounds of discriminatory policing if police had nondiscriminatory reason for the search or seizure).

255. See, e.g., *Floyd v. City of New York*, 959 F.Supp.2d 540, 556 (S.D.N.Y. 2013) (class action challenge to stop and frisk policy in New York City).

256. There is some evidence to suggest, for example, that prejudice and bias proliferates in informal settings but may be held in check in formal settings. Delgado et al., *supra* note 14, at 1390–91 (discussing theories of prejudice and concluding that, “[f]ormality and adversarial procedures thus counteract bias among legal decision makers and disputants . . . [and] strengthen[] the resolve of minority disputants to pursue their legal rights”).

257. See CHRISTIE, *supra* note 15.

258. For an analysis of the failure of constitutional and procedural rights to protect against the dramatic expansion of incarceration, see Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L. J. 2176, 2203 (2012–2013) (“Advocates for the poor, for racial minorities, and for criminal defendants should abandon rights discourse and rather focus on reducing the number of poor people overall, and African Americans specifically, who are incarcerated.”).

259. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235 (2009) (discussing the statistics proving racialized juvenile and criminal justice systems and searching for alternatives to the “carceral state”).

260. See Bush & Folger, *supra* note 252, 41–42 (discussing the potential for transformative-style mediation to assist disputants in “reasserting and reclaiming their capacities for self-determination and mutual understanding, and consequently returning to a positive and constructive interaction . . .”).

## B. Safety Concerns for Victims of Serious Crime and Domestic Violence

One might criticize a mediation program that does not require accountability for serious crimes and leaves complainants vulnerable to re-victimization as they attempt to negotiate an agreement with a person who has harmed them. The criminal justice system may offer protection for victims of serious crimes by removing from them the burden of prosecution and shielding them from direct contact with the offender.<sup>261</sup> In contrast, mediation may offer a private and informal setting in which the offender manipulates, frightens, or further injures the victim. Reflecting these concerns, the literature on mediation is replete with admonishments against the use of mediation between people who have a history of domestic violence.<sup>262</sup> More recent scholarship suggests, however, that denying victims of intimate partner violence the opportunity to mediate may be at odds with the goal of promoting autonomy and agency in victims of violence.<sup>263</sup>

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261. This has been discussed at some length within the context of domestic violence cases. *See infra* note 266; *see also* Delgado, *supra* note 9, at 762–63 (the mediation setting may fail to protect victims of crime, necessitating direct contact with the offender and the burden of determining the outcome of the case). At the same time, it has been argued that the role of complaining witness works a re-victimization through the scrutiny of discovery and cross-examination. *See, e.g.*, *State v. Sheline*, 955 S.W. 2d 42, 44 (Tenn. 1997) (“[T]he victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system.”).

262. Most of the literature regarding domestic violence in mediation discusses whether divorce and child custody mediation is appropriate for separating couples with a history of domestic violence. *See, e.g.*, Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022 (2005); Andre G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN’S L.J. 272 (1992); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Laurel Wheeler, *Mandatory Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559 (2002). *Cf.* Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L. Q. 53 (2005) (suggesting a case-by-case assessment of the appropriateness of mediation rather than a blanket ban on mediation in cases of intimate partner violence).

263. *See, e.g.*, Goodmark, *Autonomy Feminism*, *supra* note 24 (discussing the ways in which legal interventions on behalf of the victims of domestic violence tends towards paternalistic control and denies agency and self-determination of the victims). *See also id.* at 22 (defining autonomy as “the independence to deliberate and make choices free from manipulation by others and the capacity to make reasoned decisions about how to live one’s life”).

Within the criminal court system, the victim of domestic violence has almost no control over the outcome of the case. The trend of mandatory arrests, no-drop prosecutions, and victimless prosecutions in domestic violence cases has rendered the perspective of the victims even less relevant to the prosecution than in other cases of violent crime.<sup>264</sup> After criminal prosecution is initiated, the court may criminalize all contact between the victim and the defendant, thereby issuing a “state-imposed de facto divorce” over the objection of the victim.<sup>265</sup> In addition to losing control over the consequences of the incident of domestic violence, the victim of domestic violence is left with no control over her personal relationship with the defendant.<sup>266</sup> The victim of domestic violence may have initiated contact with the police in order to regain some control, yet find that he or she has ceded all control to the state by initiating a prosecution that does not require the victim’s participation or consent.<sup>267</sup> Mediation, in contrast, may provide the victim of domestic violence with a welcome opportunity to exercise autonomy.

Some legal scholars have argued that restorative justice addresses both the autonomy needs and the safety concerns of the victims of domestic violence,<sup>268</sup> and sexual assault.<sup>269</sup> In restorative justice, the victim participates actively in deciding

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264. *See id.* at 11–14.

265. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 53, 56–58 (2006) (discussing the practice of criminal protective orders, issued at the request of the prosecution or *sua sponte*, by the court upon the arraignment of the defendant in cases of domestic violence).

266. *See id.* at 68 (“The existing debate in the literature over the tension between protecting women from intimate violence and promoting their self-determination contains an underlying disagreement about women’s capacity to make autonomous judgments and decisions about their relationships.”). Within the context of criminal prosecutions in Maryland, for example, a judge may order no contact between the defendant and the complaining witness as a condition of the defendant’s probation even over the objection of the complaining witness. In *Lambert v. State*, 61 A.3d 87 (Md. Ct. Spec. App. 2012), the defendant pleaded guilty to second-degree assault and received a three-year suspended sentence with probation with the condition that he have no contact with the complaining witness, his wife. *Id.* at 88–89. His wife stated to the court her desire to maintain contact with Lambert and to reconcile their marriage. *Id.* The Court of Special Appeals held that the trial court’s order prohibiting contact between the spouses over the wife’s objection was reasonable and had a rational basis. *Id.* at 90. Moreover, the Court of Appeals held that the prohibition did not unconstitutionally impinge on his fundamental right to marriage because, “[b]y perpetrating an act of domestic violence against his wife, appellant subordinated his rights to the State’s interests in punishment, deterrence, and rehabilitation.” *Id.* at 90.

267. Goodmark, *Autonomy Feminism*, *supra* note 24, at 48 (“Agency is the power to confront an intimate partner with his violence and advocate on one’s own behalf for a mediated settlement to pending litigation.”).

268. Leigh Goodmark, “*Law and Justice Are Not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. (forthcoming) (suggesting transformative or restorative justice programs such as community justice forums as an alternative to prosecution for intimate partner violence); Kohn, *supra* note 24, at 576–94 (discussing potential of restorative justice conferencing in domestic violence cases and resistance to domestic violence as an intervention). Numerous scholars and activists have debated the merits of restorative justice in cases of family violence and gender violence. *See, e.g.*, RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN (James Ptacek ed., 2010); RESTORATIVE JUSTICE AND FAMILY VIOLENCE (Heather Strang & John Braithwaite eds., 2002).

269. *See, e.g.*, C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J. L. & GENDER 311 (2012); Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218–38 (James Ptacek ed., 2010).

how the case should be resolved.<sup>270</sup> At the same time, she is assured a modicum of emotional safety because restorative justice presupposes her status as victim and requires the defendant's accountability.<sup>271</sup> It may be the case that the restorative justice format provides advantages to the victim of domestic violence. But the advantages are predicated on an assumption of guilt of the accused. Restorative justice thus may be an appropriate therapeutic intervention or sentencing alternative in cases alleging domestic violence, but it cannot accommodate cases in which the facts are disputed or guilt is denied, or cases without a clear victim because both parties engaged in assaultive behavior.

The concerns raised regarding victim safety nonetheless pose a significant challenge for mediation. In a system of criminal mediation, several safeguards could be put in place. First, participation in mediation should remain voluntary rather than mandatory. Voluntary participation in mediation is congruent with promoting agency and autonomy for victims of violent crime who might benefit from the opportunity to speak directly to the defendant and to participate in shaping the outcome. Second, the mediation program should screen cases at intake to uncover safety concerns.<sup>272</sup> Third, the mediation program should allow participants in the mediation to invite other people to support them in the mediation, such as a family member, an attorney, a therapist, or other advocate.<sup>273</sup>

## CONCLUSION

Given that nearly seven million people in the United States are currently incarcerated or on probation or parole,<sup>274</sup> any programs that attempt alternatives to prosecution should be both considered and critically examined. It may be difficult to conceptualize violent crimes with discernable victims as suitable for quasi-

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270. Kohn, *supra* note 24, at 566–68.

271. *Id.* at 545–46 (noting that the role of apology and forgiveness in restorative justice can pose a particular problem in relationships characterized by a cycle of violence that includes apology and reconciliation as a precursor to the next episode of violence). *See also id.* at 559–60 (providing that in other cases of domestic violence, apology may serve a valuable function for both “victim safety and mental health”).

272. Domestic violence screening instruments already exist and are employed within the context of mediation to resolve child custody and divorce cases. *See, e.g.,* Amy Holtzworth-Munroe, Connie J. A. Beck & Amy G. Applegate, *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646 (2010); Murphy & Rubinson, *supra* note 262.

273. Kohn, *supra* note 24, at 577 (advocating for restorative justice in domestic violence cases and stating that “[c]ommunity member and family involvement can reduce the coercive effects of having both parties in the room together and can result in the inclusion of community commitments in the resolution.”). Although Professor Kohn suggests restorative justice is a better alternative than mediation in cases of domestic violence, the inclusion of support people might answer at least part of her concerns about coercion in mediation.

274. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2013), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> (“An estimated 6,899,000 persons were under the supervision of adult correctional systems at year end 2013 . . . .”); *see also* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS, [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf) (reporting that, at the end of 2013, approximately 4.75 million adults were under the supervision of probation or parole).



decriminalization through diversion,<sup>275</sup> but the very overlap between torts and crimes in Anglo-American legal history suggests that it is not unprecedented. Diverting crimes involving violence to mediation could function as a form of quasi-decriminalization that would be appropriate in instances in which both the accused and the complaining witness agree to mediate.

Restorative justice programs have offered one possible avenue for resolving instances of interpersonal crimes out of court, and an option that may be appropriate in some instances. At its best, however, restorative justice may offer an alternative to criminal court only in a narrow range of cases—cases in which the facts of the crime are uncontested, the participants accept their roles as “victim” and “offender,” and the process dangers can be minimized. It cannot respond to process dangers without acknowledging its enmeshment in the criminal justice system, nor can it respond to instances in which there is a dispute regarding the facts underlying the charge and ambiguity regarding the roles and responsibilities of the people involved in the incident.

Diverting some cases of violence to community conferencing and victim-offender mediation shows that it is possible to resolve violent crimes out of court. This creates an opportunity to redefine what out-of-court dispute resolution might look like in criminal cases, replacing the prescriptive therapeutic agenda of restorative justice with a neutral, mediation model. An ideal system would default to mediation. Due to the effect of continued state jurisdiction over the case, the mediation process should be monitored by due process professionals to reduce risks of informality, and to ensure that the out-of-court process does not become more burdensome and more punitive than the criminal court system itself.<sup>276</sup>

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275. See James Forman, *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1004 (2010) (critiquing the work by Paul Butler, *LET'S GET FREE: A HIP HOP THEORY OF JUSTICE* (2009), for failing to recognize that releasing only non-violent offenders from prison is insufficient to mitigate against mass incarceration given the high numbers of people incarcerated for violent offenses).

276. This article was edited by New Mexico Law Review Manuscript Editor Emma Jo Chalverus.